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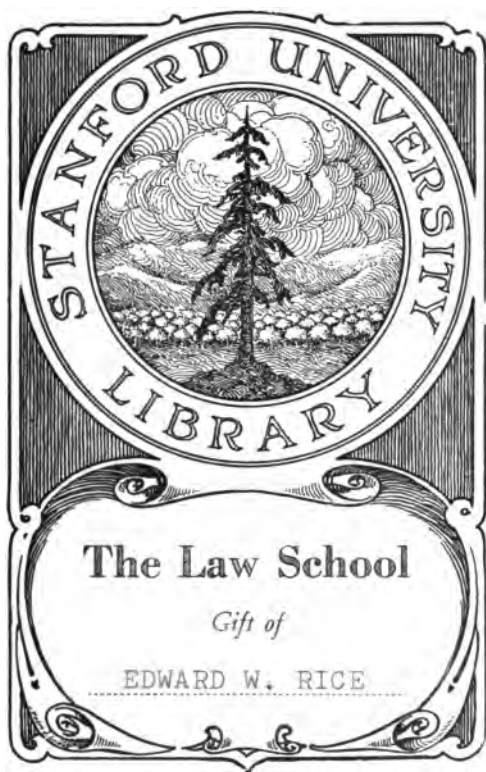
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AND
TABLE of CONTENTS.

Wrote by a late Learned J U D G E.

D U B L I N:

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TH E following learned
Treatise being wrote
some Time before the late
Statutes relating to Avowries
were enacted, the Editor has
inserted them in a Note in
their proper Place.

A N
A N A L Y S I S,
O F T H E
L A W o f R E P L E V I N S.

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THE
LAW
OF
REPLEVINS.

CHAP. I.

Of the Distress.

THE Distress is a Remedy given to the Lord to recover the Rent or Services, which the Tenant hath obliged himself by his feudal Contract to pay by way of Retribution for his Farm.

These Services, when the feudal Tenures prevailed, were chiefly of

B

two 47.

two Sorts, either military as attending on the Lord in War, or ministerial as attending his Courts in Time of Peace, and there assisting the Lord in the Distribution of Justice, or ploughing and tilling his Demesne.

Vigel. 257.
271.
Jur. feud.
Ann. 126.
129:

The Non-performance of these Services was by the old feudal Law a Forfeiture of the Feud. This is evident from several Passages in *Vigellius* (under Title, *Causæ ex quibus feudum amittitur*,) *Si Vassalus Domino non serviat, fidelitatemque ei non præstet---Si Vassalus a Domino in jus vocatus non venerit---Si pactum feudi non servetur---* These, says he, were all Forfeitures, and the Lord on such Failures of his Tenant was at Liberty by that Law to re-assume his Feud.

Bacon on
Government
48.

The Rigour of this Law was mitigated. with us, and these feudal Forfeitures.

Forfeitures changed into Distresses according to the pignorary Method of the Civil Law, from whence the Notion seems first to have been borrowed, as may be seen in the Title, *De distractione pignorum, Creditoris arbitrio permittitur, ex pignoribus sibi obligatis quibus velit distractis & suum commodum pervenire*: For there appear no Footsteps of it in the feudal Authors.

Dig. lib. 20.
tit. 5. fol.
660.

From whence soever the Name or Notion came, the Remedy obtained so early in our Law, that we have no Memorial of its Original with us; and as this Power was anciently used by Lords, it grew as burthensome and grievous to Tenants as the feudal Forfeiture, there being no Difference to the Tenant, between the Lords seizing the Land itself, and turning the Tenant out of his Possession, and his stripping him of the whole Produce or Fruits of it at his Pleasure.

B 2

And

And not only the Produce of the Farm, but the *Inducta & Illata*, and every thing that was brought on the Land were liable to the Lord's Distress: By this Means all the Plunder of the War, which the Vassal had brought home was often carried off by the Lord, and the Distress by his Power removed out of the Reach of the Tenant, and all this on the slightest Occasions.

This Power, as it was practised by the Lords, did not only oppress the Tenants, but put them so entirely under the Power of their Lords, as to enable them to bring great Numbers of their Vassals into the Field against their Prince, and thereby disturb the publick Peace of the Kingdom.

There were yet two other Inconveniencies which arose from the Abuse of these Distresses.

The

The first was, that in the Disputes and Contests which frequently arose between neighbouring Lords themselves, whilst each Lord was endeavouring to enlarge his Bounds and encroach on his Neighbour's Property, the Tenants were generally distrained by both, by which the Tenant was brought within the Seignory, and so became subject to that feudal Dependence and Service which accompanied the military Tenure.

The other Mischief was, that when the Lords had brought them under their Dependence, they would distrain them for the Amerciaments of their Courts; and as the Statute of *Marlbridge* expresses it, *Graves ultiones fecerint, et districtiones quousque redemptiones receperint ad voluntatem suam*: And what made these Abuses the more insupportable, was, that these Lords, *per Mi-* 2 Inst. 102. 3.
niftra

The LAW

nistros Domini Regis justiciarii non permittant, nec sustineant quod per ipsos liberenter distractiones quas auctoritate propria fecerint ad voluntatem suam : So that they seemed to throw off the Authority of the Law, and to subvert the fundamental Rule that no Property was to be altered without the King's Writ.

But these Oppressions ended with the Distractions of the Barons Wars; for towards the End of the Reign of *Hen. 3.* there were particular Laws made to regulate the Manner of distraining, and not to suffer the Lords to extend this Remedy beyond the Mischief it was first introduced for, which was no more than to empower the Lord by seizing the Chattels, to oblige the Tenant to perform the feudal Services.

These were to remain in the Lords Hands as Pledges to compel the Performance; and the Detention was

was no longer lawful than the Tenant refused to do the Services which were reserved by the feudal Contract; and by what Steps it came to be brought under the Regulations which govern it at this Day, we shall have Occasion to observe, by considering,

I. The several Sorts of Distresses, and in what Cases a Distress lies.

II. What Things are distrainable.

III. How the Distress is to be used; and herein of the Pound, the Place appointed by Law for the Custody of the Pledge or Distress.

I. The several Sorts of Distresses, and in what Case a Distress lies.

The Distress at common Law was used in six Cases, *viz.*

I. For

1 Ro. Abr.
665.

1. For the Services due to the Lord arising from the Tenure, as Homage, Fealty, Rent, Suit of Court, &c. for the Distress, as is already observed, came in the Place of the Forfeiture, and was a mild Alteration of the feudal Law which allowed the Lord to seize the Feud for the Non-performance of the Services.

1 Ro. Abr.
665.

4 Co. 49. b.
1 Jon. 132,
133.
Latch. 129.

So for Relief, *Aid pur fide mar-
rier*, or *pur faire fitz Chevalier*,
the Lord may distrain; for these
were Parts of the feudal Profits, tho'
they were not annual, and therefore
recoverable in the same Manner.

But it may here be necessary to
distinguish the Relief into the Relief
proper and improper.

Co. Litt. 83.
2 Spelm.
rem. 32.

1 Jon. 132,
133.

Latch. 130.

The proper Relief is the ancient
Relief, which was due to the Lord
at or before the Entry of the Heir,

3 Bulst. 323. Pl. Com. 94.

or

or new Tenant into the Land. This was anciently paid in Money, and was not so properly a Service as a Perquisite or Incident to the feudal Tenure, and arose from this, that whilst the Feud was temporary and precarious, the Lords used upon the Death of their Tenants, and before the Heir was admitted into the Feud, to oblige the Heir to pay a Sum of Money. This, after the Feud came to be established, and made perpetual, came to be Part of the feudal Profits, the Tenants easily consenting to it upon the Establishment of the Feud.

In Analogy to this, the Lords, after *Magna Charta* indulged to the Tenants the Licence of Alienation, used in their Grants to reserve a Sum of Money on every Alienation of their Tenants ; and where such Reservation appeared in their Grants with a Clause of Distress, the Lord might resort to that Remedy where

C the

the Tenant failed to perform his Part of the Contract. It afterwards happened that these Grants in which these Reservations appeared, were by length of Time worn out or lost, and then the Lords prescribed in taking the Relief; but for these prescriptible Reliefs, the Lord could not distrain, unless he could likewise prescribe in the Distress: For as the Prescription created the Right to this improper Relief, so there must be a Prescription to give the Remedy; for otherwise they were looked upon as Burthens and Exactions of the Lords upon their Tenants, and tended to disable them from appearing in the Field armed and equipped for the publick Service, and for that Reason were said to be against common Right; that is, against the Policy of the Law, which provided for the publick Safety, before the private Profit of the Lord, and therefore were not encouraged, nor any Remedy either
by

by Distress or Action given for them, unless the Lord could shew as early a Title to the Remedy as he did to the Duty itself.

In like Manner the Heriot is of two Sorts, the Heriot Service and the Heriot Custom.

The Heriot now is the best Beast ^{Spelm. rem. 32.} of the Tenant, but anciently was taken out of the *Militiæ apparatus*, and was a Device first introduced to keep a conquered Nation in Subjection, and to support the publick Strength and military Furniture of the Kingdom, by taking on the Death of the Tenant his best Armour; and hence it became Part of the Services arising from the Tenure, and therefore to be distrained for as other Services. This, as the military Service declined, was turned into something of private Profit to the Lord; and, instead of the *Militiæ apparatus*, they took the best

C 2 Horse,

Horse, Ox, or Cow, and the same Remedy was continued as where the Heriot was paid in the Habiliments of War.

Br. Abr. Heriot. Pl. 7, 8.
Keilw. 82.

The Reservation of this Heriot Service was not only of publick Utility, but also for the private Safety of all the Tenants in the Manor, that the Habiliments of War should be kept amongst themselves for their Defence, and therefore where there was no such Tenure between the Lord and Tenants of some particular Manor, the Tenants by Agreement consented that the Lord should have the best Part of the military Furniture ; and this Agreement created a Custom, which being the Law of the Manor, created a Right to the Lord to seize.

But the Lord could not distrain, because where-ever there was any Footsteps of a Distress, it was always supposed to be Part of the feudal Reserva-

Reservation : And the Heriot Custom arising originally from the Grant of the Tenant, and not reserved by the Lord upon his feudal Donation, was not a Service arising from the Tenure between Lord and Tenant, and therefore was not under the Regulation of feudal Services, and consequently not to be distrained for, as these Services were.

But where such Heriot Custom obtains, the Property of the Heriot is actually in the Lord upon the Death of the Tenant, because the Choice of the best Beast is in the Lord, and not in the Tenant : And hence it is, that the Lord may seize the Heriot Custom wherever he finds it, either on the Tenants Land or off it, or even in the King's Highway. And if it be cloigned, he may have Trespass or Detinue for it, for the bringing the Action determines the Choice for that Beast, as if he had seized at first ; and whoever takes it

Keilw. 82. a.
Br. Abr. Heriot. Pl. 7.
2 Inst. 182.
1 Show. 81.
1 Salk. 356.
Cr. Car. 260.

it violates the Property, which was vested in the Lord by the Death of the Tenant; but in the Case of such Eloignement the Lord cannot distrain the Tenant as he may for the Heriot Service, because the Distress was introduced for the Recovery of feudal Duties, of which the Heriot Custom is no Part.

Pl. Com. 96. But it hath been much doubted
 Keilw. 82. a. whether the Lord might seize the
 Br. Her. Pl. 7. Heriot Service, because that being
 3 Bull. 325. Part of the feudal Duties arising from
 Dr. Stud. 74. the Tenure between the Lord and
 Moor 540. Tenant, ought to be governed by
 Cr. El. 32. the same Regulations, with the other
 1 Show. 81. Services; and therefore if where the
 2 Lutw. Tenant holds by a Capon or a Hen,
 1367. &c. the Lord must distrain, and cannot seize as for his own Property, so neither ought he to seize for a Heriot Service. But this Point seems now settled, that the Heriot Service is seizable as well as the Heriot Custom, because the Choice of the best

best Beast is in the Lord, and therefore he only is to determine that Choice by a Seizure; but where the Tenure is by the Rent of a Hen or a Capon, &c. he is to render, and therefore the Lord can only compel him to do it by Distress,

2. The second sort of Distress is Cr. Ja. 382.
for Fines and Amerciaments in Court ^{1 Ro. Abr.}
Leets, and this stands upon a differ- ⁶⁶⁴
rent Bottom; the former Distress ^{8 Co. 38. 41.}
^{11 Co. 45.} only relates to private Contracts, between Landlord and Tenant; this Distress relates to the Transactions in a Court of Justice, and is allowable either for a Fine imposed by the Steward, or for Amerciaments assessed by the Jury on Persons guilty of Nuisances, or of any other Crime presentable or conusable in the Leet.

But for Amerciaments in a Court Baron, the Lord cannot distrain,
but

but is put to his Action of Debt for Recovery thereof.

To understand this rightly, we must observe that Court Leets were originally derived out of, or rather Exemptions from, the Sheriffs Torn, and therefore are Courts of Record as the Torn is.

In those Leets, tho' the Lord or his Steward prefides as Judge, yet the Court is *Curia Domini Regis*, and was at first established to punish Trespases and publick Nuisances, which arose within the Precincts of the Leet, as the Torn did thro' the whole Kingdom. Hence it comes that in all things necessary for the Support of the Jurisdiction of the Court, the Judge was armed with the same Power with the Judges above, and therefore the Steward for any Contempt in Court might impose a Fine, and imprison for it, as the Judges above; because, what is

is necessary for the Vindication of the Honour of the Court, the Steward is not obliged to go to a superior Court to seek Redress for; but for an Amerciament, which is imposed for any Transgression out of Court, of which the Court has Cognizance, there was no Fine or Imprisonment, because that Court could only try lesser Offences, which were not fineable, the greater Offences being remitted to the Justices in *Eyre*, and this Fine for Contempt in Court when imposed, being grounded on the Judgment of the King's Court of Record, created a Debt for which the Steward might either imprison or levy the same on the Goods and Chattels of the Debtor, but for the Amerciaments the Steward could only distrain, and not fine and imprison.

The Process that levies this Debt, Dalton Her. is in the Books called a Distress, be-^{401.} cause the Lord might at common ^{Finch 125.} 8 Co. 41. b.

D Law

Law impound the Distress until the Fine was paid ; but, as the *distringas* or *levare* for levying those Fines and Amerciaments issued in the King's Name ; and as the Lord may likewise sell this Distress, it is rather to be esteemed in the Nature of an Execution, than a Distress in the genuine Sense of the Word; the Distress originally being no more than a Pain on the Tenant, and a Pledge in the Lords Hands to compell the Tenant to perform the Services, and therefore could not be sold, till the *Stat. of 2. W. & M. c. 5.*

5 Co. 38. 41. And hence it hath been held, that the Steward may impose a Fine upon a Man for refusing to be sworn a Constable, and may distrain for that Fine.

Dalt. Sher.
400.

So if a Man oweth Suit to the Sheriff's Torn, and refuseth to be sworn, or if a Bailiff of a Leet refuseth in Court to execute his Office ; these
are

are all Contempts to the Authority of the Court; and the Steward may impose a Fine, and levy it by Distress of the Offenders Goods.

So if a Man oweth Suit to the Sheriff's Torn, and doth not make his Appearance, he may be amerced and distrained for the same, because 'tis a Contempt to the Court in refusing Obedience to their lawful Commands : but, *qu.* whether this be properly an Amerciament.

Dalt. Sher.
401.
Br. dist.
Pl. 8.
Fitz. Abr.
Avowry Pl.
194.

The Difference between Fines and Amerciaments is, that the Fine was *pro gravioribus delictis*, the Amerciament *pro minoribus*.

The *graviora delicta* were punished either by the View of the Judge himself, as Fines for Contempts done in Courts, or on a View of Nuisances, but out of Court by the Justices of the Peace,

D 2

or

or upon Indictment, or other Conviction.

Of such *graviora delicta*, the Fine is set by the Court itself, because such *graviora delicta* must be against the King's Peace, the Quantity of which the Court are Judges of, who have Commission from the King to see that such Peace be preserved; and therefore in such Cases, the Jury are only Judges whether the Defendant be guilty of the Fact or not; but the Court is Judge of the Quantity of the Fine, and therefore it is called a Fine, because it ends with the Court; and is not to be affected by the Jury.

But in *Minoribus Delictis*, as for not appearing at the Court Leet or Torn, the Judge may order the Jury to affect an Amerciament on such a Defaulter, and issue a Distringas for levying the same.

But

But it seems that at the Assizes and Sessions where the Judges and Justices sit by an immediate Commission from the King to keep the Peace of the County, the Non-appearance of Suitors to make Enquiries for Breaches of the Peace is among the *graviora delicta* ; so that there the Court hath Power of itself to impose a Fine which must be estreated into the *Exchequer* to be levied.

And so where the King grants to any Corporation a Power to hold Sessions, if such Court fines for Non-appearance, such Fines must be estreated into the *Exchequer*, and levied by the Process of that Court ; and such Corporation, tho' they have the Grant of such Fines from the Crown, cannot get them out of the *Exchequer* but by Petition, or *Monstrans de Droit*.

But

But if instead of fining such Persons, the Sessions shall order that they be amerced, and the Jury assess the Amerciaments, it may be levied by Distingas.

Cr. El. 748. But Court Barons were instituted for the private Advantage of the Lord, and the Ease of the Tenants of the Manor, this is *Curia Domini Manerii*, in which the Suitors are Judges, and therefore their Amerciaments being imposed only for the Lords Advantages, and for not doing Suit to his Courts, or performing the Services due to him, such Amerciaments are not grounded on the Judgments of the King's Courts, or Courts of Record, and therefore only created a Debt for the Lord to be sued for in the King's Court, that the Justice of it might be controverted in the King's Court, and therefore the Law never allowed the Lord to distrain for those
Amercia-

Amerciaments in either of the Ways abovementioned : For the Lord ought not to have a Distress for them in the Nature of an Execution, because that were to alter Property without the King's Writ, or the Process of the King's Courts ; nor was it reasonable to allow the Lord to distrain and impound for these Amerciaments, because they were set (among other Causes) for not doing Suit to the Lords Court, and other Services arising from the feudal Tenure, and were in Nature of a Penalty inflicted on the Tenant for the Non-performance thereof ; but for these the Lord might distrain by Virtue of the feudal Grant, and therefore ought not to distrain for the Amerciament too, for that were in Effect to allow the Lord a double Distress for the same Thing, for the Service itself, and for the Amerciament, which is the Penalty for the Non-performing that Service, which were vexatious, and would put the
Tenant

Tenant too much in the Power of the Lord.

11 Co. 45. 2.
1 Rol. Abr.
666.

But if the Lord can prescribe in a Distress for the Amerciament, then the Distress becomes lawful, because such Prescription is presumed to be founded on a Grant of the Tenants, by which they subjected themselves to the Distress, and tho' the Grant be worn out by Length of time which created the Distress, yet the continual Usage is a good Evidence of it, and therefore the Tenants must submit to that Custom which their Ancestors put them under.

Cr. El. 748.
Rowleson,
v.
Alman.

But if the Manor belongs to the Crown, the King by his Prerogative may distrain the Tenants for Amerciaments imposed in his Court Baron without Prescription, because it is of publick Advantage that the King's Treasure should be collected in the most expeditious Manner.

There

There is, however, this Distinction to be observed in Fines imposed by a Court Leet itself; for they are either imposed by a Steward for a Contempt to the Court, and this is absolutely necessary for the Support of the Authority and Dignity of the Court within the Boundaries of their Duty; or else they are imposed as a Punishment on those Crimes which are punishable by the Court. But where by Custom the Leet hath Jurisdiction to impose a Fine, for a Thing not originally within the Jurisdiction, but only acquired by Custom, in such a Case, as that particular Custom gave the Leet a Right to impose the Fine, so the Custom only can create the Right of Distress.

Thus where a Leet laid a Custom for a Township to send one to be sworn Constable, which not being done, a Fine was imposed, and a

E Distress

Vent. 105.
Pierfon, v.
Ridge,
Raym.
204. S. C.

Distress taken for it, the Distress was held unlawful, because there the Steward of the Leet did not prescribe in the Distress, and nothing else would warrant it.

11 Co. 44. b.

1 Rol. Rep.

32.

Godfrey's
Case.

2 Leon. 74.

3 Leon. 178.

So it is, *pro Certo Leet*, which was a Sum given by the Tenants to reimburse the Lord for the Purchase of the Leet, the Lord cannot distrain for it without a Custom to warrant the Distress, because this is a Sum purely of private Advantage to the Lord, and in no sort necessary to be paid to keep up the Jurisdiction of the Court.

3 Co. 41. b.

But for Fines and Amerciaments in Leets, the Lord may either distrain and sell the Distress (and then the Distress is in Nature of an Execution of the Judgment of a Court of Record) or else he may impound the Distress, and then it is repleviable.

And

And here it may not be improper barely to mention another Sort of Distress, which is the last and great Process in Courts of Judicature, to bring the Defendant into Court, and oblige him to appear in Civil Cases in Actions as well real as personal.

This Process, and the Attachment which precedes it, lies as well in inferior Courts, not of Record, as in superior Courts, and is given when the Defendant has been summoned to appear and makes Default, then goes the Attachment, which is not a Process against the Body of the Defendant, but against his Goods and Chattels: For the Officer attaches the Defendant by his Horse, his Ox, or Cow, and where this Dalt. Sher. Process issues out of a Court of Re-^{417.}cord, there is no doubt but if the Booth 8. Defendant makes Default, the Goods Dy. 199. ^{Pl. 54.} he was attached by are forfeited, because in such Case there is a Judgment

ment of the King's Court of Record condemning the Goods which alters the Property.

Kitch. 155.

Dalt. 418.

Bro. Court.

Bar. Pl. 1.

And it seems that in the County Court and Court Baron, which are not Courts of Record, if the Defendant does not appear upon the Attachment or Distress, the Goods by which he was attached or distrained are likewise forfeited on his Default. The Reason why in this single Instance the Property is altered without the King's Writ, or the Judgment of a Court of Record, seems to be for the more speedy Administration of Justice, which is of publick Advantage, and the Party by his Appearance might have prevented the Forfeiture.

And here we may likewise observe, that where the Plaintiff recovers in the County Court, or Court Baron, the Execution is only by Distress, that is, there issues a Precept

Precept to the Officer of the Court to take the Goods of the Defendant, and keep them in Pound, until the Defendant satisfy the Plaintiff of his Debt; all the Reason is because these are not Courts of Record, being held only in the Lords or Sheriffs Name, and therefore all the Processes run in their Names and not in the King's, and without the King's Writ no Property can be altered; so that the Execution in these inferior Courts only seizes and detains the Defendant's Goods until he makes the Plaintiff Satisfaction for his Debt, and therefore we find in the Register the King's Writ *de Executione Judicii* of these inferior Judgments, and by Virtue of that they may levy the Plaintiff's Debt as if he had recovered it in a Court of Record.

In the Lords Court if the Defendant does not appear to do Justice to the Complainant on the Summons, on the next Process he ought to give
Pledges

Pledges or Caution for his Appearance, and therefore upon the Attachment they may return him attached *per Plegios*, and then if he don't appear his Pledges shall be amerced, for which Amerciament the Lord may have his Action of Debt; and if the Defendant cannot find Pledges, the Attachment is *per Vadios*; and since the Lord would have had the Amerciament if the Defendant had been attached, and by Pledges, and had not appeared, therefore if he be attached *per Vadios*, and do not appear, the *Vadii* are forfeited; for the *Vadii* come instead of the *Plegii*, and therefore are hypothecated for his Appearance in Judgment of Law; and by Consequence if he doth not appear to perform the Condition of such Pignoration, the *Vadii* are forfeited; and therefore the Defendant where he is attached *per Vadios*, may before the Day of his Appearance replevy the *Vadios*, and put in Pledges who are

are answerable for his Appearance, and if he makes Default are amerced.

But if there be a *Levare* for a Debt recovered in the Lords Court, there the Goods are not forfeited on the Return, because after Judgment he hath no Day to appear, and therefore there can be no Forfeiture arising to the Lord nor the Party, because he was not bound by his Fealty to do any such Act to the Party recovering, and consequently here the Lord only seizes the Chattles of his Tenant to make him pay his Debts; but the Plaintiff must apply to the King's Court to have the Property altered by a *Writ de Executione Juridicii*, and so hath a compleat Remedy for his Demand.

But if the *Kadi* were not to be forfeited on mean Process, the Tenant would let such Goods lie till he at his Leisure could come in to contest

contest the Debt, which would tend to the Delay of Justice.

And here note by the Way The Lords Distress for Rent in nature of a prerogative Process to take the Goods and Chattels of his Debtor, in the first Instance without any Summons, but at the next Court Day such Distress is not forfeited to the Lord, if not replevied, because then he would judge of Forfeitures in his own Cause.

But if the Tenant was aggrieved he must apply to the King who is the Lord Paramount, and the Count plaintive, that he was distrained *contra Vadium & Plegium*, that is, when he was ready to give good Security to contest the Lords Debt, and therefore the Judgment in Replevin of Return irrepleviable, that is, that the Lord has a just Cause to detain, that such Prerogative of the Lords should

should take Place till the Debt be satisfied.

3dly. A third Case where a Distress lies is for Toll in Fair or Market.

And here the Law is clear, that ^{1 Rol. Abr. 666.} where a Lord hath a Fair or Market ^{Raym. 233.} by Prescription, and hath used to ^{Hob. 187.} take Toll of the Cattle sold, if such Toll be not paid, the Lord may seize any of the Cattle so sold, and retain them till Satisfaction be made him for the Toll; for the Prescription is built on a Grant of the King's, which by length of Time is supposed to be worn out, and that Grant was originally made for publick Utility, Fairs and Markets being instituted for the more convenient supplying the Subject with the Necessaries and Conveniencies of Life; and therefore every Subject that buys there, may very reasonably be charged for that Conveniency with a moderate
F Toll;

Toll ; and the Lord hath the Advantage of the Toll as a Compensation for the Mischief done to his Soil by the Beasts sold : And as the Lord might have distrained the Beasts for *Damage Feasant*, if he had not such Fair, so he may distrain for the Toll, which is in nature of a Compensation for that Damage ; and hence it should seem reasonable that where the Fair or Market subsists merely by Grant from the Crown, as where the Fair is newly created by Grant, and Toll thereby given to the Grantee, that he may distrain for such Toll ; for *qui sentit Commodum sentire debet et Onus* ; and an Action of Debt would be no Remedy ; but this Distress is only a Pledge to be detained till Satisfaction made, and doth not seem to be within the *Stat.* to be sold.

Dr. & Stud.
Dial. 2 Cap. 9

4^{thly}. If a Township be amerced and they by Consent assess a certain Sum on every Inhabitant for the raising

raising thereof, and likewise agree that if it be not paid by such a Day, that certain Persons appointed for that Purpose by the Township shall distrain for the Sum assessed on each Inhabitant. This is a lawful Distress because consented and submitted to by the Agreement of those Persons who are to pay the Tax; and the more reasonable, because the raising the Tax in that Manner is for the Ease of the Inhabitants, in regard the publick Officer must otherwise levy and collect the Arrears.

5thly. A Penalty inflicted for a Breach of a By-law may be levied by Distress; but this only in Case where such Remedy is appointed for Recovery thereof by the Power that made the By-law, and at the Time the By-law was made; because the By-law only binds the Members of that Community who make the Law, and therefore the Assent of

5 Co. 64. a.
Clarke's Case.
1 Bol. Abr.
366.
Dy. 321.
Pl. 23.

F 2 every

every Member is presumed in the Institution of that Law, and consequently the Penalty may be recovered by Distress where the Parties themselves have agreed to that Remedy ; but unless the Distress be expressly provided for by the Corporation, the Penalty can be recovered but by Action of Debt ; but the Subject cannot be imprisoned for the Breach of any By-law, though it be so expressly ordained by the Power that made the By-law, because such Imprisonments is against *Magna Charta*, and therefore the By-law appointing it is so far void as being against the Law of the Land.

But where the Corporation can prescribe in the Distress, they may lawfully distrain for the Penalty, because the prescriptible Right is grounded on a By-law originally appointing that Remedy for Recovery of the Penalty, and therefore is good though the By-law on which it is grounded

grounded be by Length of Time worn out or lost.

6thly. A Man may distrain Beasts Fleta 101.
Damage Feasant. This (according Bro. Distr.
to *Fleta*) is grounded on a particular Pl. 3.
Custom of the Realm, *Si dicere poterit Captor*, says he, *quod Juste cepit averia quia invenit illa in sua et secundum Consuetudinem Regni imparcavit illa donec damnum suum fuerit emendatum.* But from whence this Notion was borrowed, or whenever introduced, 'tis highly reasonable that the Owner of the Land should defend himself from Injury by driving out the Beasts, and likewise detained the Thing that did the Injury in a publick Pound, till Compensation be made for the Trespas; for otherwise the Person injured might never find the Person whose Beasts committed the Trespas.

II. What Things are distrainable.

The

Bro. Dist..
Pl. 8.

The Distress, as is already observed, was anciently no more than a Pledge in the Hands of the Lord to compel the Tenant to pay the Service or perform the Duty for which it was taken, and therefore at Common Law could not be sold, but like all other Pawns or Pledges was to be restored to the Owner when the Service or Duty was performed.

The Nature then of contracting by Pawns or Pledges being that upon Payment of the Money for Security whereof they were given, the Pawn or Pledge ought to be restored to the Owner in the same Plight and Condition it was delivered---It follows,

1 Rol. Abr.
666. H. P. 4.

1st. That Money cannot be distrained, except it is in a Bag, for then the Knowledge of the Bag, especially if it be sealed sufficiently secure the several Pieces of Money therein

therein, so as the same individual Pieces may be restored on Redemption of the Pledge,

2^{dly}. Sheaves of Corn at Com-^{1 Jones 197.}
mon Law could not be taken as ^{Cooper, *vid.*}
Pledges for Rent, because all Pledges ^{Pollard.}
were to be returned in the same ^{1 Rol. Abs.}
Plight and Condition as they were ^{666, 667.}
taken, for these shed and scatter the ^{Syd. 440.}
Grain by being removed, and consequently cannot be restored in the same Condition upon the Redemption. For the same Reason Hay in a Cock or Barn could not be distrained; yet at Common Law Corn or Hay in a Cart might have been distrained together with the Cart itself, because then the Pledge might have been removed without Damage to the Owner, and might likewise be restored in the same Condition it was taken, the Whole being removed with the Cart; but this Law was found inconvenient to Landlords, and too great an Encouragement

ment to Tenants to withhold their Rent, and therefore 'tis provided by 2. *Gul.* 3. c. 5. That it shall be lawful for any having Arrear of Rent to seize and secure any Sheaves or Cocks of Corn loose in the Straw or Hay lying in any Barn or Granary, or upon the Howels, Stack or Brick, or otherwise upon any Part of the Land or Ground charged with such Rent, and to lock up or distrain the same in the Place where it shall be found in the Nature of a Distress until the same shall be replevied, &c.

Co Lit. 47.
Dy. 312.
2 Inst. 132.
965.

3^{dly}. Utensils of a Man's Trade cannot be distrained, because this would tend to publick Inconveniences, and to the Ruin of particular Tenants, by taking away the very Means of their Support and Preservation, and therefore the Ax of a Carpenter, the Books of a Scholar are not distrainable, while any other Distress can be had.---But lest this Rule

Rule should be carried so far as to privilege the Sheep of the Tenant, and their Beasts of the Plough, they being the Materials of Husbandry, to plow and manure the Land, and by that Means the Landlord be totally disappointed of the Rents: This Matter hath been settled by the *Stat. of 51. H. 3. De Distractionibus Scaccarii*, that no Man shall be distrained by the Beasts of his Plough or his Sheep, either by the King or any other, while there is another sufficient Distress unless for *Damage Feasant*, in which Case the Thing that does the Trespass must make Compensation.

4thly, Things sent to publick Co. Lit. 47
Places of Trade, as Cloath in a Tay- 1 Salk. 249.
lor's Shop, Yarn in a Weaver's, a
Horse in a Smith's Forge, and the
like, are not distrainable; for 'tis 1 Ld. Raym. 386
of publick Utility that the Shops of
Traders should be privileged from
the Lords Distress for his Rent; for
G otherwise

otherwise no Man could supply himself with the Necessaries of Life without the Danger of loosing them for anothers Debt, and therefore the Landlord cannot distrain these Things for the Rent of the Shop.

Cr. El. 549.
596.
Read v.
Burley.

J. S. A Clothier put Wool to B. a Spinner to spin, and afterwards J. S. comes with a Horse to bring back the Yarn; but B having no Weights in his own House to weigh it, J. S. took his Horse and went with B. to the House of C. to get the Yarn weighed, and C's Landlord, while the Yarn was weighing, came and distrained the Yarn and the Horse of J. S. for C's Rent; but the Distress was held unlawful, because if the Yarn had been weighed either in B's House, or in a publick Weigh-house, it had been unquestionably privileged for the Encouragement of Trade: So in this Case the Design of bringing the Horse and Yarn into the House of C. being only

only in the Way of Trade, that Design secures them from a Distress in the House of C. as much as if they were in a publick Weigh-house.-- As a Horse that brings Corn to a Market, and is put into a private Yard while the Corn is selling cannot be distrained, because the Purpose of bringing the Horse is *pro bono publico*, and in the Way of Trade.

But if a Stranger's Beasts be upon the Lords Lands by Escape or otherwise, though they be not levant and couchant, the Lord may distrain them, not only for Rent, but for the accidental Services of Heriots Amerciaments in Leets, &c.

10. H. 7.
21. b.
1 Rol. Abr.
668, 669.
Co. Lit.
47. b.
2 Saund 389
290 Sed. vid.
1 Raym. 197
8, 9.

This Rule was observed in the Civil Law in the *Predii Urbani*, but not in *Predii Rustici*.--But when the Forfeiture of the Feud which originally accrued to the Lord by not answering the Services was changed into a Distress, this was

C 2 thought

thought a mild Alteration, and the Distress was the rather extended by our Law to Strangers Cattle for the Recovery of the Services, to prevent any Trick in the Tenant, who might otherwise disappoint the Lord of his Remedy by grazing and stocking the Land with other Mens Cattle : and if the Stranger suffers, 'tis thought his own Default for suffering his Cattle to trespass on another's Soil.

2 Saund. 289.
Poole, v.
Longueville.
Sed vid. 1 Rol.
Abr. 668. Pl.
6, 7.

And this Rule hath been carried so far, that if a Freeholder be bound to repair his Neighbours Fences, and lets the Land, and the Lessee suffers the Fences to decay, whereby his Neighbours Beasts enter and come upon his Lands, yet the Freeholder may distrain these Beasts thus escaped for Rent. But the Reporter observes this to be a hard Law ; for though it be reasonable that the Lord of the Manor who is no way concerned in the Fence should distrain Beasts thus escaping

escaping, yet 'tis not therefore just, that the Freeholder who is obliged to see the Fences kept, should be suffered to take Advantage of his own Wrong.

So it hath been held that where ^{3 Lev. 260,} a Stranger puts in his Beasts to graze ^{261.} for a Night, by the Consent of the ^{Foulkes, v. Joyce.} Lessor, and Licence of the Lessee, ^{2 Ventr. 50.} yet the Lessor may distrain them for ^{S. C.} Rent due out of those Lands which ^{2 Lutw. 1161.} he consented the Beasts should graze ^{S. C.} on, because the Consent for putting ^{But note, the Grazier was afterwards relieved in Equity, it being deemed a Fraud in the Lessor.} in his Beasts was not a Waiver of his Right of distraining, unless it had ^{2 Vern. 129.} been expressly agreed so; for being ^{Pres. Cha. 7.} but a Parol Agreement it could not alter the original Contract between the Lessor and Lessee, from which the Power of distraining arises.

Note. Those Beasts were driving to the Market of *London*, and only grazed one Night on these Lands on the Road, and

and it was disputed in the Case whether their being on the Road to that Market should privilege them, and 'twas resolved it should not, because then such Privilege must extend thro' the whole Kingdom, which would lay too great a Restraint on Landlords; and the Privilege of Trade is local, and only relates to the Place where the Market is kept; therefore the safest Way is to drive all Cattle to publick Inns, and then they are privileged from all Distresses.

But for a Rent Charge the Grantee cannot distrain a Stranger's Beasts until; they are levant and couchant. For this Rent doth not stand upon a feudal Title (as the Rent Service) but is said to be against common Right, as is elsewhere observed; and therefore the Stranger's Beasts must be so long resident on the Lands, out of which the Rent Charge issues, that

a Leon. 7, 8.

that Notice may be presumed to the Owner of them, that is, they must be lying down and rising up on the Premises for a Night and a Day, without Pursuit made by the Owner of them.

And it seems the Sheriff may di-^{Bro, Distr.} strain the Beasts of a Stranger on my 4^o. Land for the Issues forfeited by me in the King's Courts for my Non-appearance ; for the Issues forfeited by my Default create a Debt to the King, which is to be levied on my ^{Et vid. Br.} Land, because the Obligation on me ^{Distr. 3.} to appear on the Summons in the King's Courts arises from my being Proprietor of such Land, and I am summoned to appear on the Penalty of forfeiting so much of the Issues of that Land which creates the Obligation on me, and therefore whatever is found on that Land shall be answerable for the Issues forfeited by me.

5^{thly}.

Co. Lit. 47.
b.

5thly. Whatever is Part of the Freehold cannot be distrained, for what is Part of the Freehold cannot be severed from it without Detriment to the Thing itself in the Removal, and consequently that cannot be a Pledge that cannot be restored in *statu quo* to the Owner.

Besides what is fixed to the Freehold is Part of the Thing demised; but the Nature of the Distress is not to resume Part of the Thing itself for the Rent, but only the *Inducta* and *Illata* upon the Soil or House, Hence it is that Doors, Windows, Furnaces, &c. affixed to the Freehold are not distrainable,

Br. Distr.
23.

So a Millstone is not distrainable though it be removed out of its proper Place in order to be picked; because such Removal is of Necessity, and the Stone Still continues Part of the Mill. So it is of a Smith's Anvil

Anvil on which he works ; for this is accounted Part of the Forge, tho' it be not actually fixed by Nails to the Shop.

6thly. What is in the Hands and actual Occupation of another cannot be distrained ; for that cannot be a

Co. Lit. 47. a
1 Rol. Abr.
667 1 Syd.
440

Pledge to me which another has the actual Use of ; and consequently the Distress which follows the Nature of the Pledge cannot be of those Things which cannot be reduced into the actual Possession of the Person distraining ; therefore the Ax in a Carpenter's Hand, or the Horse on which I am riding cannot be distrained, for they are for that Time privileged by Law.

7thly. Goods in the Custody of the Law are not distrainable ; for 'tis *ex vi termini* repugnant, that it should be lawful to take Goods out of the Custody of the Law. — And that cannot be a Pledge to me which

H

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I cannot bring into my actual Possession. Hence it is that Goods distrained for *Damage Feasant* cannot be taken for Rent, nor Goods in a Bailiff's Hands on an Execution, nor Goods seized by Process at the Suit of the King; nor will a Replevin lye of them.

3. H. 7. 1

But if a Replevin come after Goods are sold on the Execution, the Defendant must claim Property, for then they are out of the Custody of the Law in the Hands of a private Person.

Having thus shewn what Things are distrainable, before we come to consider the Pound which is the common Repository for all Distresses, it will be necessary in this Place to observe these Things in general of Distresses.

1st. When we speak of Chattels not distrainable, it must be understood

stood not distrainable for Rent; for all Chattels whatever are distrainable *Damage Feasant*, it being natural Justice that whatever doth the Injury should be a Pledge to make Compensation for it. — Therefore all ^{Co. Lit. 47.} Chattels are liable to make Satisfaction ^{h Syd. 440.} for the Trespass by them committed; and hence it is that the Utensils of a Man's Trade, Stacks of Corn, and the Horse on which a Man rides, are distrainable *Damage Feasant*, and the Horse may be led to the Pound with the Rider on him.

2dly. No private Person can di-^{2 Inst. 131.} strain Beasts off his own Land on the high Road, so is the Statute of *Marlbridge, c. 15. Nulli liceat ex quacunque Causa districtiones facere extra Feodum suum, nec in Regiâ viâ, aut Communi Stratâ, nisi Domino Regi, &c.* For the High Road is privileged for the Convenience and Encouragement of Commerce; but

though Chattels or Pledges on the Land only are to answer the Lords Rent; yet if the Lord comes to distrain, and the Tenant seeing him drives the Cattle off the Land, the Lord may follow the Beasts and distrain out of his Fee, if he had once a * View of his Cattle on his Land. But if the Beasts go off the Land of themselves, before the Lord seizes them, he cannot distrain them afterwards as he might where the Tenant drives them off: For the Tenant by his own Wrong cannot prevent the Lord of his Right.

Dr. and ft. 75
a. Co. Lit.
142. a.

3^{dly} A Man cannot distrain in the Night for Rent, because the Tenant hath not thereby Notice to make a Tender of his Rent, which possibly he might do to prevent the impounding of his Cattle. — But a Man may

* Altered by 8. Ann. c. 14. and Landlord may seize in 5 Days after Lessee has conveyed them off the Land; and by 1. Geo. 2. c. 19. the Time is enlarged to 20 Days.

may distrain in the Night Beasts *Damage Feasant*, because the Beasts might escape before Morning, and then he would have no Remedy for the Injury.

4^{thly}. Distresses ought not to be excessive but in Proportion to the Duty distrained for. — This is prohibited by the Statute of *Marlbridge*,^{2. Inst. 106; c. 4.} *Districiones insuper sit rationabiles & non minus graves & qui districiones fecerint irrationabiles graviter amercientur.*¹⁰⁷

Thus if the Lord distrain two or three Oxen for ^{Inst. 107.} 12d. this is unreasonable; so if he distrain a Horse or an Ox for a small Sum where a Sheep or a Swine may be had, this is an excessive Distress. — But if there be no other Distress on the Land then the taking of one entire Thing though of never so great Value is not unreasonable.^{1 Rol. Abr. 674}

No

4 Co. 8. 66. No Distress for *Homage, Fealty*,
 1 Rol. 674. or for the Expences of Knights in
 Parliament can be excessive, because
 these are Services of such absolute
 Necessity to the Publick that Men
 cannot be under too great an Obliga-
 tion to perform them.

1 Rol. 674. 5thly. No Man is obliged to give
 Notice of his having taken a Distress,
 because the Tenant must know the
 Arrears that are due, and therefore
 at his Peril must take Care to pay
 them, so that it is his own Default
 that subjects the Land to the Lords
 Distress; besides the Law has ap-
 pointed a publick Pound for keeping
 the Distress, where the Tenant by
 resorting may have Notice.

But, 2u. Whether notice must
 not be given of dead Chattels which
 must be kept in a private Pound.

The

The next Thing to be considered ^{Spelm. Glos.} is where the Distress, which is but a ^{447.} Pledge, is to be kept, and that is in the Pound. — This is described by *Spelman* in these Words--*Parcus est Stabulum, vel area Angustior Repagulis firmiter conclusa, quâ Nociva in frugibus prediisq; pecora tanquam in carcere Coercentur, — Parci autem usum a Continente traduxisse Saxones, nostros hinc intelligas, quod in Ripuariorum legibus jam olim utpote ante 800 vel 900 Annos reperitur, (Tit. 82 S. 2) si quis peculium alienum in Messe adprehensum ad Parcum minare non* ^{Gall. mener.} *permiserit, 15 Sol Culpabilis judicetur.*

The Pound then being nothing ^{Co. Lit. 47. 6} more than a publick Prison for Goods and Chattels, is either *Overt* or *Covert*; all living Chattels, distrained are regularly to be put in the Pound *Overt*, because the Owner at his Peril is to sustain them, and therefore they

they ought to be put in such an open Place as that he may have Resort to them for that Purpose.

2. Inst. 106. At Common Law a Man might have impounded his Distress in what Country he pleased ; but this was found very inconvenient to the Owner, who was thereby at a Loss where to find them, either to feed the Beasts or to replevy them : This Mischief was provided against by the Statute of *Marlbridge, c. 4. Nullus de cætero faciat ducere districtianes quas fecerit extra Comitatum in quo Captæ fuerint.*

Yet upon this Statute it hath been held that where the Tenancy is in one County and the Manor in another County, the Lord may drive the Distress to the Manor Pound though it be out of the County where the Distress was taken ; because the Tenant by attending the Manor Court is presumed to know every Thing

Thing transacted in the Manor; and therefore this Case is out of the Mischief provided against by this Law.

But now by the Statute of 1 & 2 ^{1 Car. 1. Sect} *Pb. & M. c. 12.* no Distress of ^{2. c. 25 in} Ireland Cattle is to be driven out of the Hundred or Barony where the same is taken, except it be a Pound Overt within the said Shire, not above three Miles from the Place where the same is taken; nor shall a Distress be impounded in several Places whereby the Owner may be constrained to sue several Replevins, on Pain to forfeit to the Party aggrieved Five Pounds and treble Damages:

Dead Chattels, as Household Goods, ^{Co. Lit. 47. b.} &c. which may receive Damages ^{1 Rol. Abr. 673} by the Weather, must be put into a Pound Covert, otherwise the Distrafter is answerable for them if they be damaged or stolen away; and this Pound Covert must be ^I within

within three Miles in the same County.

But Beasts (as is said) ought to be put in a publick Pound ; for if they be placed in a private Pound the Distrainer must keep them at his Peril with Provision, for which he shall have no Satisfaction ; and if they die for Want of Sustenance the Distrainer shall answer for them.--- But he cannot in any Case make any Use or Advantage of the Thing distrained, whether it lies in a Pound *Overt* or *Covert*, either by working or milking the Beasts, though it were for its Ease and Benefit ; because the Distrainer has only the Custody of the Thing as a Pledge, and therefore is not to make Use of it, but the Owner may make Profit of it at his Pleasure.

1. Rol. Abr.
673.

The Distrainer cannot tie or bind a Beast in the Pound though it be to prevent its Escape, for the Beasts
in

in Pound are in Custody of the Law, which intends the Preservation of the Pledge, and therefore the Distrainer at his Peril must do no Act that tends to the Hurt or Destruction of them. If a Distress be taken without Cause a Stranger cannot rescue them from being driven to Pound; but the Owner may make Rescue before they are impounded. — But after the Beasts are impounded, the Owner himself cannot rescue them, unless he find the Pound unlocked, for he cannot break it open. — The Reason is, that the naked Possession is a Title against any Person but the Owner; but the Owner has a Title, and therefore may take the Beasts at any Time, but he cannot break the Pound the Law hath ordained.

OF THE
R E P L E V I N,

C H A P. II.

HAVING in the foregoing Chapter shewn in what Cases a Distress or Pledge may be taken, and how it is to be disposed of, the next Thing in order to be treated of is the Remedy given the Party to controvert the Legality of such Caption, in order to bring back the Pledge to the Proprietor in case that the Distress were unlawfully taken, and without just Cause; and this being a Writ of great Use, and every Days Practice, deserves a very full Consideration.

Spelman

Spelman in his Glossary describes it thus — *Replegiare est rem apud* Sp. Gl. 45 *alium Detentam Cautione Legitimâ interpositâ redimere — Et hac Cautio est stipulatio in forma Juris adhibita, de stando Juri et sistendo se foro dictum autem Replegiare quasi revadare, hoc est Vadium vel pignus unum loco alterius suggerere & constituere.*

Or, in other Words, a Replevin is a Justicial Writ to the Sheriff complaining of an unjust taking and detention of Goods or Chattels, commanding the Sheriff to deliver back the same to the Owner upon Security given to make out the Injustice of such taking, or else to return the Goods and Chattels.

Under this Head is to be considered ;

I. How the Replevin stood at Common Law, and the Alterations that have been made therein, by Statutes.

II.

II. Of the Duty of the Sheriff, in the Execution of the Replevin, and herein of the Pledges.

III. Of the Process to make the Defendant appear.

IV. Of the Process where the Goods are eligned and herein of the Writ of *withernam*.

V. Of the Process and proceeding where the Defendant claims Property.

VI. Of the Process, as well for the Plaintiff as Defendant, in removing the Replevin from the Inferiour Courts.

VII. Of the Replevin itself, and herein are to be considered,

1. For whom and in what Cases it lies.

2. The Declaration in Replevin.

3. The several Pleas in this Action.

4. The Judgment in this Action, whether for the Plaintiff or Defendant, and herein of the Writ *de Retorno habendo*, and the Writ of second Deliverance.

VIII. Of the Writ of Recaption.
6thly.

I. To consider how the Replevin stood at Common Law ; and here 'tis first to be observed that the ^{2. Inst. 140} Replevin was at Common Law a ^{Reg. 81. a} Justicial Writ, that is, gave the Sheriff a justicial Power to determine the Point complained of in the Country. Whereas other Writs gave him only a ministerial Power. This judicial Power is taken from these Words in the Writ—*Et eum iuste deduci facias*—by which the Sheriff is made Judge, whether the taking be just or not ; and this was highly reasonable, that this Remedy might be speedy, lest the Party should want his Beasts for carrying on of his Husbandry ; and therefore not to have formed this Writ Justicial would have been not only detrimental to private Persons, but to the Damage of the Common Wealth, Hence it is called *Festinum Remedium*.

dium. Besides, it would have been of great Trouble and Expence to private Persons to have taken the Determination of these Sort of Complaints, which must have happened every Day, out of the Neighbourhood. And yet the Manor Court was not trusted with this Power in any Cause between Lord and Tenant, because the Lord was not to be Judge in his own Cause:

2dly. 'Tis to be observed that there are two Things complained of in this Writ, *viz.* The taking and Detention of the Pledges, as the Words of the Writ express it—*Quæ cepit et injuste detinet*— But what is principally controverted in the Replevin, is whether the taking be just or not. For there are but two Cases wherein a Distress justly taken, whether for Rent or *Damage Feasant*, can be unlawfully detained The first is where the Arrears of Rent, or Amends for the Damage is tendered

Dr. and ft.
112.

2. Inst. 107.

5. Co. 76. a.

8. Co. 146. b

Cr. Eliz. 813.

Pilkingtons

Case.

to

to the Party distraining; and this Tender must be made before the Beasts are impounded; for when the Beasts are in the Custody of the Law, the Person distraining cannot be said unlawfully to detain what is in the Custody and Care of the Law.

And hence it is, that if a Tender be made after impounding, and the Beasts die in Pound, the Owner shall bear the Loss, because such Tender comes too late to fix any Fault or Injustice on the Person distraining. But if the Tender had been before the impounding, it seems the Distrainer is answerable because the impounding is unlawful.

But here 'tis to be observed, that the Tender of Amends must be pleaded to the Lord himself, and not to the Bailiff, who makes Conusance of the Cause of the Caption and Detention in the Right of the Lord, and that Right is not barred by a
K Tender

Co. 76. a.
Cr. El. 813.
1 Rol. Rep.
258.
1 Brown 173.

Tender to any other than the Lord himself. But if a Tender be pleaded to the Lord, and they give in Evidence a Tender to the Lord's Bailiff, where the Lord was present, that won't maintain the Plea, because the derivative Power of the Bailiff ceases where the Lord is present, and they ought to prove the Tender to that proper Person to whom the Amends belong, and who was ready to receive it. But if they plead a Tender to the Lord, and prove a Distress taken by a Bailiff, the Lord not being present, and prove the Bailiff to be the usual Receiver of the Lord, *Qu.* If that will not be a Proof of sufficient Tender of Amends to the Lord himself?

2. Inst. 107:
34¹.

The second Case where the Detainer is unlawful, is where the Avowant hath Return irreplevisable, and the Owner of the Beasts tender all that appears to be due on the Judgment in the Avowry, the De-

tainer

tainer of the Avowant is unlawful, and the Owner may have his Action of Detinue for the Detainer after the Tender made: For though by the Judgment the Return is made irreplevifable, yet that is no final Condemnation of the Beasts or Goods distrained, for they are still to be considered as Pledges in the Hands of the Avowant, and therefore in their own Nature liable to a Redemption upon Payment or Satisfaction of that Rent or Damages for which they were originally taken.— My Lord *Coke* assigns another Remedy for the Owner to recover his Beasts, and that is upon Satisfaction made in Court to have a Writ for their Delivery.

2^d. The Form of this Writ,

The Detention then being complained of in this Writ, it may not be improper to look into the antient Method of trying such unlawful

K 2 Denten-

Detention, and what Remedy the Owner of the Beast hath for it at this Day. The antient Method of trying the Legality of the Detention was very inconvenient, for the Plaintiff in Replevin was to have his Suitors ready to prove *instante* that he offered a Pledge under that Notion as a Pledge sufficient, and the Lord was then put to his Law-Wager, that the Pledge offered was not sufficient to answer the Debt; so that it was totally thrown upon the Lords Conscience to determine of the Sufficiency of the Pledges, and this Method of Tryal was antiently practiced and allowed, because originally the Lord might have seized the Land for Non-performance of the Services, and therefore when the Rigour of that Law was mitigated by turning the Forfeiture into a Distress, it could not be thought any unreasonable Favour or Indulgence to the Lord to make him Judge of the Sufficiency of the Pledge which

which was to be put into his Hands while the Suit depended, because the Lord in all Events ought to be safe,

This Account of trying the Legality of the Detention is given by *Bracton* in the following Words.

Si autem defenderit detentionem injustam, & quærens sectam habeat *Bract. 156. 1*
Fleta 94
statim ad manum quæ examinata in omnibus concors fuit, & quod omnia facta fuerint sub eorum præsentia, tunc vadiabit defendens legem se duodecima manu in qua si defecerit incidet in manum Vicecomitis, & restituet querenti damna sua quæ habuit per illam detentionem; si autem legem fecerit Dominus, tunc quietus recedet, et querens in misericordia, sed nulla damna recuperabit, et returnabit Domino averia capta.—The Lord recovered no Damages where he prevailed on the Law-wager, because the Lord had no Damage where the Tender proved insuffi-

insufficient. But if the Lord prevailed not on the Law-wager, the Plaintiff in Replevin had his Damages because he really was injured by the Lords Refusal in losing the Use of his Beasts or Goods which he had a Right to upon the sufficient Tender.

Dr. and ft.

112.

Cr. El. 813.

F. N. B. 69.b.

But the Legality of the Detention depending entirely on the Sufficiency of the Tender, a more equal and better Method of Tryal was found out by the Conscience of Twelve disinterested Men, no Way concerned in the Event of the Tryal. And the Point comes in Issue in the following Case; where the Lord impounds the Beasts notwithstanding the sufficient Tender of the Tenant, the Tenant hath no Way to recover his Cattle but by his Writ of Replevin; for if he takes them out of the Pound himself he is liable to an Action for breaking the Pound: This puts the Lord to his Avowry wherein

wherein he must shew the Cause of his taking and detention, to which the Plaintiff in Replevin replies, That after the taking, and before the impounding, he made a sufficient Tender, and thereupon it shall be tried by a Jury whether the Tender was sufficient, and if it be found so the Plaintiff in Replevin shall have Damages for such unlawful Detention.

But though by the Common Law this Writ was made justicial for the Ease of the Subject, and the more speedy Administration of Justice, yet the Subject (both Lord and Tenant) was exposed to many Difficulties and Inconveniencies in the Progress of the Suit, which were afterwards removed by several Statutes. For,

1st. The Replevin at Common 2 Inst. 133.
Law was only by Writ, and this 5 Mod. 253
Application must be to the Chan-
cery,

cery, which was too tedious for the distant Parts of the Kingdom.

To make this Remedy therefore more expeditious 'tis provided by the Statute of *Marlbridge*, c. 21. *Quod si Averia alicujus capiantur et injuste detineantur, Vicecomes post querimoniam sibi factam ea sine Impedimento, vel contradictione ejus qui dicta averia ceperit, deliberare possit.* By Force of this Statute the Sheriff may hold Plea in Replevin by plaint of any Value as he might at Common Law on a Writ of Replevin, the Writ of Replevin being a Justices or Commission for that Purpose.

F. N. B. 69. And to take away all the Delays
Co. Lit. 145. that attended the Replevin by Writ,
2 Inst. 139. the Sheriff by this Act may upon Complaint made command his Bailiff either by Word or Precept to replevy the Plaintiff's Beasts, for possibly the Sheriff cannot write (which was frequently the Case in these Days)
or

or has not the Materials of writing with him, and this the Sheriff may ^{Bro. Rel. Pl. 46. 21. E.} do out of his County Court: For ^{4. 66.} this Act being made for the more speedy Administration of Justice, hath received the most favourable Construction, For it would be very inconvenient that the Owner of the Beasts, for whose Benefit the Act was made, should stay till the next County Court which is held from Month to Month; but then the Sheriff must enter the Plaint at the next Court, that it may appear on the Rolls of the Court.

2^{dly}. Another Mischief at Common Law was that the Replevin being judicial and determinable in the County Court, if the Plaintiff in Replevin pleaded to the Lords Avowry that the Tenancy was *Hors de Son Prie*, the inferior Court had no farther Continuance of the Action, because this Plea brought the Freehold in question, which the County Court

L

not

not being a Court of Record had no Power to try, and therefore could not proceed ; by which Means the Lord was left without Remedy to recover the Beasts as his Pledges, because the Court could not determine the Point on which the Return was to be made ; this was remedied by *W. 2. c. 2.* which gave the Lord a *Pone* to remove the Cause into the King's Courts where that Plea might be tried, and the Lord be established in the Possession of his Services, and still have the Pledges *de Retorno habendo* retained for him.

A third Mischief at Common Law was that when the Avowant had Judgment for a Return of the Beasts, he had frequently no Benefit by his Suit, because it frequently happened that, pending the Suit, the Tenant had sold the Cattle delivered to him on the Replevin, and became insolvent. This Mischief arose from this, that the Sheriff

Sheriff could only take from the Plaintiff *Plegii de prosequendo* in this as in other Actions, which Pledges were only to answer the Amerciament to the King *pro falso Clamore* and looked no further : And even these being very small did soon degenerate into Form. To remedy this Inconvenience the said Statute of *W. 2. c. 2.* hath directed the ² *Inst.* 338 Sheriff, *non solummodo recipere Pleg.* ^{340.} *de prosequendo de Conquerentibus, sed etiam de Averiis retornandis, si adjudicetur retornand' ; et si quis alio modo Plegios ceperit respondeat ipse de pretio Averiis.*---But the Method of proceeding in this Case will be fully treated of under the Writ *de Retorno habendo*.

4^{thly}. Another Mischief was that ² *Inst.* 338. if the Plaintiff had non-suited him- ^{340.} self, and the Avowant had Judgment never so often on such Non-suit, yet he could not have a Return irreplevisable, but the Tenant might

L 2

replevy

replevy the same Distress *in infinitum*. This also is remedied by the same Statute of *W. 2. c. 2.* by which it is provided, *Quod quam cito adjudicatum fuerit retorum averior. distringenti per breve de Judicio mandetur Vice comiti quod retorum habere faciat distringenti de averiis in quo brevi inscratur, quod Vice comes ea non deliberet sine brevi in quo fiat mentio de Judicio per Justic' reddit' quod fieri non poterit nisi per breve quod exeat de Rotulis Justic, coram quibus deducta fuerit Loquela*; and pursuant to this Law the Writ *de Retorno habendo* concludes thus after a Recital of the Judgment for the Avowant, *Ideo tibi precipimus quod pred' (the Avowant) averia pred. sine delatione retornari facias et ea ad Querimoniam ipsius (the Plaintiff in Replevin) non deliberes sine Breui nostro quod de prefat. Judicio expressam faciat mentionem.*

Regr. Jud. 4
8.

This,

This Writ which must recite the former Judgment is the Writ of second Deliverance, which will be treated of in its proper Place.--- Only here it may be necessary to observe, that if the Avowant hath Judgment in the second Deliverance he shall have Return irreplevisable of the Beasts, but subject still to Redemption by the Tenant on Payment of the Rent, because they are still in the Nature of a Gage or Pledge. The several other Alterations that have been made in the Replevin will be taken notice of under the subsequent Heads.

II. Of the Duty of the Sheriff in the Execution of the Replevin; and herein of the Pledges.

Whether the Replevin be by
 Plaintiff or Writ, the Sheriff be- V. Dalton 277
Cr. Car. 446.
 fore he grants the one or exe- Cr. Ja. 414.
3 Mod. 57, 58
 cutes the other ought to take from Dorrington
 the Plaintiff Pledges *de pros.* & Verfus Edwin
comb. 1 2 Sho.
 Pledges *de Retorno habendo*; the first 420. Skin. 244
Dalton 439,
as 440.

as has been said was at Common Law to answer the Amerciaments to the King *pro falso clamore*, in case the Plaintiff did not prevail in the Suit. The other Pledges were introduced by *W. 2. c. 2.* for the Security of the Avowant in case he should have Judgment for Return of the Beast : And by this Act these Pledges are answerable to the Avowant if the Plaintiff hath disposed of of the Beasts pending the Suit ; and if the Pledges are insufficient, the Sheriff is made answerable by that Statute for their Insufficiency.

Dalton. 440.
Offic. Brev.
222.

And it seems the Pledges *pro Retorno habendo* may be by Bond even of the Plaintiff in Replevin himself. The Condition of which is not only that the Plaintiff shall prosecute the Suit in Replevin, but also that he will make Return of the Beasts if Return thereof be adjudged by Law, and also to save harmless and indemnify the Sheriff for Delivery of the

the said Beasts : For the Sheriff being answerable for the Sufficiency of the Pledges may take the Security as he pleases, since it is at his own Peril.

These Pledges are in the Nature Cr. Car. 446.
of Sureties *pro Retorno habendo*, and 1 Jones 378.
therefore Money or any other Cattle Dalton 434.
being a Pawn is not a Pledge within
this Statute ; for the Process as shall
be hereafter shewn is by *scire facias*,
which is a Process to bring the
Pledge or Surety into Court to shew
Cause, and therefore Cattle cannot
be a proper Pledge : For this Reason a
Sheriff has been adjudged to be liable
to an Action of the Case for
taking Money as a Pledge *de Retorno
habendo* ; because the Money was
not such a Pledge as the Statute directs.
And it seems there must not
necessarily be more Pledges than
one, if that be sufficient ; though the
Words of the Act are *Pledges* in the
plural Number : Because if one
Pledge be sufficient the Defendant
hath

hath no Loss, and therefore the Intention of the Statute is answered which provides for the Defendant's Safety.

2 Inst. 139

140.

F. N. B. 68.

The Sheriff having thus taken Pledges from the Plaintiff in Replevin, he ought forthwith to make Deliverance of the Goods or Cattle distrained; but if the Distress was taken within a Liberty and impounded there, the Sheriff ought first to issue his Warrant to the Bailiff of the Liberty having Return of Writs to make Deliverance. And if the Bailiff makes no Answer, or as the Statute of Marlbridge says, *Ea des liberare noluerit, tunc Vicecomes pro defectu ipsorum Bailivorum a facienda deliberari*.—This Act as to this Part of it was made to enlarge the Power of the Sheriff by empowering him to enter into the Liberty to make Delivery where the Bailiff was negligent. Whereas at Common Law the Sheriff could not enter into the Liberty.

Liberty without a *non ommittas* which was too dilatory.

And by this Act if a Distress was ^{2. Inst, 133.} taken out of a Liberty and im- ^{140.} pounded within it, the Sheriff may enter the Liberty without any previous Warrant to the Bayliff, because the Caption which is one of the Points complained of in the Replevin, was in the County, and out of the Liberty, and therefore the Right to make a Deliverance, ought to be in that Officer, within whose District or Jurisdiction the Cause of Complaint first arose; and all this is Law, whether the Replevin be by Plaint, or by Writ.

If the Distress be drawn into a House, Castle, or other strong Hold, the Sheriff or his Bailiff, after Demand made for the Deliverance of the Distress, may break open the House or Castle to replevy them.
—This seems to be the Common
M Law,

2 Inst. 193.
194.

Law, for tho' a Man's House is privileged by Common Law, for himself his Family, and his own Goods, so that the Sheriff cannot break it open to attach any of them, in a Civil Action at the Suit of a private Person; yet a Man's House could not privilege, or protect the Goods of another Person unjustly taken, so as to prevent the Officer to make Replevin, because the Privilege and Security of a Man's House, could protect but his own Goods.—This Practice however, of driving Distresses into strong Holds, was so frequent in the Barons Wars, and the poorer Sort suffered so much from the Men of Power, that the Statute of *West.* 1. c. 17. expressly gives this Power to the Sheriff, or his Officer, to break the House, to make Delivery of the Cattle, whether the Replevin be by Plaint or by Writ.—But this, as is said, must be after Demand made, and Notice given to the Lord to suffer

suffer them to be Replevied. And to Dalton 438.
deter the Person distraining, from 439.
refusing or neglecting to Deliver
the Distress, the Statute further
directs, that the Castle, or strong
Hold, [shall be razed and thrown
down ; but this must be on a Suit in
Behalf of the King, wherein all
Parties concerned in Interest must
first be heard ; and by this Act, if
the Bailiff of a Liberty having re-
turn of Writs, shall not make De-
liverance for the Reason aforesaid,
the Sheriff may proceed without
Delay, or any new Authority to
make Replevin in Manner afore-
mentioned, though in other Actions,
even in Executions, at the Suit of
private Persons, he cannot enter a
Liberty without a *Non omittas*.

If the Replevin be executed, and
the Deliverance made, where it is Dalton 438.
by Plaintiff, the Bailiff at the Time he 439.
makes Deliverance, ought also to
attach the Defendant by his Goods,

M 2 depending

depending in the County Court, to make him appear at the next Court Day; for in this Action the Attachment is the first Process, because the Replevin complains of a tortious taking which is in Nature of a Trespass.

F. N. B. 69.
M. 70.
Dalton 440.

Where the Replevin is by Writ, and the Sheriff executes it before the *Alias* or *Pluries* comes to his Hands, the Sheriff may hold Plea of it in his County Court; but either Party may remove it by *Pone* or *Recordare* into the Courts above, the Plaintiff without Cause, and the Defendant upon Cause shewn.

This Writ of *Pone*, if it be taken out by the Plaintiff in Replevin, hath a Clause in it to Summon the Defendant, to appear in the Court above at the Return of the Writ, *Quod tunc fit ibidem præfato A.* (the Plaintiff) *inde responsurus*; and so *vice versa*, If the Replevin be removed

removed by the Defendant, then the *Pone* Commands the Sheriff, *quod dicat præfato A* (the Plaintiff) *quod sit ibi Loquelam suam versus prædictum B* (the Defendant) *inde Prosecuturus, si voluerit, &c.* and by this means both Parties have Days in the Court above.

If the Sheriff doth nothing upon F. N. B. 68. the first Writ, the Plaintiff may have an *alias*, and after a *pluries* Replevin; in the *pluries* is always inserted this Clause, *vel causam nobis certiffices, quare mandatum nostrum alias tibi inde directum exequi noluisse vel non potuisse*, and the same may be inserted in the *Alias* if the Plaintiff pleases, and then both the *Alias* and *Pluries* are returnable in the King's Bench or Common Pleas, 1 Rol.ab. 58r. and the *Pluries* always determines the Power of the Sheriff to hold Plea of the Replevin in the County; and so doth the *Alias*, where the said Clause of *vel causam*

sum nobis certifies, &c. is inserted.

—The Reason is, because this Clause gives either Party a Right to call upon the Sheriff, in the Courts above, to give an Account of the Execution of the Writ; and this on the Pretence or Supposition, that the Sheriff hath not legally Executed the Writ; the Sheriff thus called upon, cannot give the Court an Account how he hath executed the Writ, but by his Return on the Writ itself, and that cannot appear Judicially to the Court, till the Writ and the Return be filed, and the Sheriff having thus parted with the Writ, he has no Authority to proceed farther in the Court below.

By this means the Plaintiff in Replevin may controvert the Sheriff's Return, and shall recover Damages against him, if it be found to be false, or not duly made.—This is allowed the Plaintiff not only for his

his Damages, but also to intitle the King to a Fine against the Sheriff, for his Contempt, and is the most expeditious way to oblige the Sheriff to make the Deliverance fairly, that the Plaintiff may not want his Beasts to carry on his Husbandry.—But if the Sheriff injures the Defendant, in the Execution of the Replevin by taking some of his Cattle, the Defendant has his Action of Trespass against him to punish him, as in all other Cases of Trespass; and here we may observe one Thing peculiar to this Writ of Replevin, that the Defendant on the Return of the *Alias* and *Pluries* has no Day in Court, nor is he as much as summoned to appear by the Writ, in the Court above; whereas in all other Actions, the Defendant by the very Original, is put to his Pledges for his Appearance.—But the Reason of the Difference is this, in other Originals the Defendant is but summoned to answer the Plaintiff

Rol. ab. 584.
Gawen ver.
Ludlow,

tiffs Demands, and the Plaintiff by such Writ, gets nothing from the Defendant till the Event of the Suit, and therefore the Defendant must have a Day in Court by the Original.—But in Replevin the Plaintiff hath his Beasts restored to him, on the Execution of his Writ, and the Defendant shall never have Return, unless in his Avowry he can justify the Caption, so that from hence it appears the Defendant need not be summoned in this Writ, because it is plainly for his Interest to do so, because otherwise he can never have the Return of the Cattle; and thus the Defendant becomes Plaintiff or Actor.—And hence it follows that the Parties in Replevin may appear and Plead, at any other Term than that in which the Replevin is returned, because having no Day in Court on the Return, as is before observed, there can be no Discontinuance of the Suit, tho' the Plaintiff should not declare in the same Term

¹ Rol.ab.581.
Gaven ver.
Ludlow.

Term.—If the Plaintiff should not declare in Replevin, the Defendant though he hath no Day in Court, may however come in, and oblige the Plaintiff by Rule of Court to declare, because otherwise the Defendant could never have the Judgment of the Court for a Return of the Beasts.

But if the Plaintiff should of him-^{Officin. Brev.} self declare without any Compul-^{413.} sion from the Defendant, as he may ^{Dyer 246. n} do, the Defendant is brought into ^{Raft. Entr.} Court by Attachment, &c. to Plead, ^{570.} and if the Plaintiff shall obtain Judg-^{Vid. the Form} ment by Default, what Remedy hath he for his Damages? ^{of the Writ,}

It is usual now for the Plaintiff to take out the Replevin, *Alias* and *Pluries*, at the same Time, and if he has a Mind to take the Cause at once out of the Sheriffs Hands, he may deliver the *Alias* or *Pluries* as he thinks fit to the Sheriff, without ever shewing him the Original
N Writ.

Writ.—By this the Plaintiff as is already observed, has a Right to call for the Sheriffs Return, and the Sheriff ought himself to appear in the Court above, to purge his Contempt, for disobeying, or not executing the original Writ, which the Law presumes was delivered to him, and then the Sheriff may excuse himself, by making an honest Return on the *Alias* or *Pluries*, et *quod nullum aliud Breve*, &c. came to his Hands ; and thus the Plaintiff if he pleases, may at once oust the Sheriff of his Jurisdiction, without the Trouble of removing the Plea out of the Sheriffs Court by *Pone*.

Raf. Int. 578. a
vill. the Form.

III. We come now to the Process in Replevin to make the Defendant appear.

And here it is to be known, that the Replevin is *vicontieil*, and is a Commission to give the Sheriff Authority, to gage Deliverance of the Beasts, and therefore there is no Day given to the Defendant by this Writ ;

Reg. 81.

Writ; but on this Commission the Sheriff makes out a Precept to deliver the Beasts, and also an Attachment to the Defendant to appear at the next Court Day.—So if it be by Plaintiff the Precept is made to the Bailiff to deliver the Beasts, and to attach the Defendant; and the reason why Attachment is the first Process, is that Replevin complaining of a tortious Taking, is in Nature of a Trespass, and there an Attachment *per Plegios* is the first Process, lest the Defendant should Escape,

But if the Sheriff do not execute the Replevin, then an *Alias* goes out, in which there may be a *vel Causam nobis significes*, and the reason is, that the Plaintiff being deprived of the Use of his Beasts which he is obliged to sustain in the Pound, the Law allows that he should in the *Alias* put in the third Process, because the Officer as a Defaulter is not answerable for not executing

executing meine Process till after two Faults; but for the above reason, because the Beasts may be Elonged, and the Withernam may issue on the second Process, the *Causam nobis significes*, is put in the *Alias*; and this *Alias* is either returnable into the King's Bench or Common Pleas; in the Common Pleas, because it is a Civil Plea, and in the King's Bench, because it is in the Nature of a Trespass; and into Chancery, because he may have a Withernam thence upon an *Elongata*, since there is another Original, viz. a *Pluries*, which is yet to be Issued out of that Court.

If there be not *Causam nobis significes*, it is only *vicontiel*; as the first Writ. In the *Pluries* they must put in the Clause, *vel Causam nobis significes*, because there has been two Neglects already in the Process.— When the *Pluries* Issues, it has been much disputed whether the Sheriffs *vicontiel*

vicontiel Power be determined, and its said by the Reporter 2 H. 7. 5. ^{Fitz. Reple. 16.} that since the Writ is to repley, *vel* ^{Salk. 410.} *Causam nobis significet*, the *vicontiel* Power continues. — But if he does not replevy them, he is to shew ^{Br. Jour. 82.]} Cause why he did not, and this the Reporter argues to be the Sense of the Writ, from the disjunctive Words in it.

1 But I take it, that the *vicontiel* ^{2 H. 7. 5.} Power is determined by the *Pluries*;
1. Because the Sheriff has been twice guilty of neglecting his Duty, and therefore is not to be trusted with judicial Power.

2. He is answerable to the Court how he has obeyed the Writ, and ^{1 Rol. ab. 580.} therefore the Court must have the Writ, to see whether he has done his Duty or not, and if the Court be intitled to the Writ, to see whether the Officer has done his Duty, he cannot proceed on the Writ.

By

22 H. 6. 20.
Rast. Ent. 570.
Process in
Replevin.

By the *Pluries* there is no Day in Court, either to the Plaintiff or Defendant, but to the Sheriff in order to Fine him, for disobeying the first Writ.—But the way to give the Parties Day on the *Pluries Replevin* is thus :

If the Plaintiff comes into Court and *obtulit se* at the Day on which the Sheriff is to shew Cause to that Court, why he did not execute the first *incontiel* Process, there as it appears by the Entries in *Rastal*, he shall have an Attachment against the Defendant, to bring him in to Answer, and this Writ gives them both a Day in Court.

The Reason is that Replevin is in Nature of a Trespass, and on every Trespass the Attachment is the first Process ; and therefore as well in the Sheriffs Court below, as in the Court above, the Plaintiff may have

an

an Attachment in the first Proceſs, and if that the Defendant does not appear, and *nulla Bona* returned, then on the Statute 25 E. 3 Cb. 17. they may have a *Capias* and Proceſs of out-lawry.—But at Common Law there was only a Diſtreſs infinite, becauſe there was no Fine to the King on the Replevin, unleſs where the *Elongata*, or Claim of Property was returned by the Sheriff; for theſe being Contempts of the King's Proceſs, there was a Fine at Common Law, and therefore a *Capias* in the Common Proceſs came in by the Statute.

But if the Defendant comes in at the Day, the Sheriff has in Court, he cannot demand the Plaintiff, be-
2 H. 6. 2.
qd. vide
1 Rol. 2.
Bro. Recor. 2.
 cauſe the Plaintiff has given the Defendant no Day in Court, and if the Defendant hath no Day, he cannot demand the Plaintiff under the Peril of a Nonſuit, and therefore the Method is for the Defendant to have

have a special Writ to warn the Plaintiff to come into Court and prosecute his Plaint, which is in Nature of a *Venire*, and if the Plaintiff does not come into Court, at the Return of such Writ, then he shall be Nonsuited, and the Pledges amerced, in the same Manner as where there is a vicious *Pone*, that gives the Defendant no Day in Court, yet the Record being removed, the Court proceeds on the first Writ there is removed, and on such Writ if the Defendant appears the Plaintiff was not demandable, because there was no Day given to the Defendant, but he had a special Writ to warn the Plaintiff to come in and prosecute, and if the Plaintiff does not on such Writ appear, he is Nonsuited.

III. Of the Process where the Goods are eloigned, and herein of the Writ of *Withernam*.

2. Inst.

140. 141.

Withernam is derived from the Saxon Word *Everder*, or *other*, and

and Naam, which signifies Distress, as who should say *another Distress*, instead of the former that was Eloigned—*Vetitum Namium*, is Spelm. de ver-
bis namium,
vetitum nasti-
am. unlawfully taken, because though the taking of the Beasts might be originally lawful, yet the detaining against the Replevin, is unlawful or forbidden.

The *Withernam* is Part of the *Lex Talionis*, which as it prevailed in the Cases of Mayhem, where the Judgment of old was in this Kingdom, Eye for Eye, and Tooth for Tooth, so was it in the Case of taking and against detaining Pledges, Beast for Beast.

Withernam was twofold.

I. In the County below, And

II In the Courts above.

O

I. In

Reg. 82.

1. In the County below ; though the Sheriffs Bailiff returned, that the Beasts were Eloign'd, yet the *Witbernam* did not immediately go, because the Defendant was not to lose his own Beasts on the Return of a Bailiff, against whom if the Return were false, he could have no Satisfaction. — And therefore in such Case, there was an Inquest of Office holden by the Sheriff to see whether the Beasts were found to be Eloigned or not ; and if the Beasts were found Eloigned, then there issued a *Witbernam*, for the Eloignment found by the Jury, *Secundum Legem Talionis*.

2. In the Court above the *Witbernam* is awarded on the *Elongata* returned. For the King's Minister having returned, that the Beasts were Eloigned, so that he could not do Execution, there is a proper Ground to award this Process. —

First,

First, because the Sheriff is liable for a false Return, who is a Person sufficient to Answer the Party.

Secondly, because the Sheriffs Return is supposed to be true, till the contrary appears, and there is no Mischief to the Defendant in this Case, since on producing the Cattle which he has taken, he may have his Beasts again; and therefore it was proper, such a Writ should go out *Secundum Legem Talionis*, on the Sheriffs Return without any Inquest, rather than the Plaintiff should want his Cattle, and his Husbandry stand still in the mean Time.

This Writ lyeth where a Man takes the Goods or Cattle of another Man; and the Party sueth a Replevin by Writ, and an *Alias* and *Pluries*, and upon the *Pluries* the Sheriff doth Return, that the Cattle

F. H. new
Edition 178.
old 78.

or Goods, &c. are Eloigned, &c. and not upon Suggestion only that the Beasts are Eloigned, (11 H. 8. 16. *per Cotton*) by Reason whereof, he could not replevy them, &c. this being an award, *Secundum Legem Talionis*, could not be on a Surmise, unless the Eloignment was found on him by Inquest below, or returned upon him above, by the proper Officer. Then this Writ of Withernam shall Issue out of the Court, where the Pluries is returned, returnable in the King's Bench or Common Pleas; and not out of the

42 & 43 Eliz.
inter Crindel
& Pound C.B.

Chancery. But if *Elongata* be returned upon the *Alias* in Chancery, then the *Withernam*, shall Issue out of the Chancery; (22 H. 6. 22. *per Brown*) for the *Elongata* being the Foundation of the *Withernam*, wherever the *Elongata* is returned, there the *Withernam* must be awarded. And since the *Alias* as it is said is returnable into Chancery, the *Withernam* must thence Issue.

—But

—But though it goes out from thence, it is returnable into one of the Benches, because it gives the Day thereon to proceed, and because the Defendant Goods are taken *Secundum Legem Talionis*, he must have a Day given to Dispute the lawfulness of such taking, and the Form of the Writ is such. — *Rex Vic. Reg. 82.*

Linc. Saltm. quum Pluries tibi Precepimus, &c. quod juste &c. A. averia sua quæ B. &c. vel Causam, &c. quare mandatum nostrum Pluries tibi inde directum Exequi noluisti vel non potuisti, ac tu nobis significaveris quod postquam prædictus B. averia præd. A. Cepit, averia præd. elongavit, & in Com. tuo ea fugavit, de Com. præd. in Com. B. per quod eaeidem A. Replegiare non potuisti, nos malitiæ ipsius B. obviare volentes in hac parte, tibi Præcipimus quod averia præd. B. in Balliva tua, Capias in Withernam, & ea detineas, donec eidem A. averia sua

sua præd. secundum Legem, & consuetudinem Regni nostri, Repleg. possis, Juxta tenor. Mandator, nost. præd. prius tibi, &c.

Vide.—That the Defendant shall have a Day in this Writ, by Attachment and not otherwise, *vid.* 7.H. 4. 27. 43, E. 3. 26. 35.H. 6. 47. viz. if the *Elongata* be returned on the *Pluries Repleg. fac.* then it has such Clause, *Et si Quer. fec. &c. tunc Pone Defendantem, &c. ad Respondendum tam Dn. Reg. de Contemptu, quam præf. Quer. de Captione & injusta Detentione Cattallorum prædictorum, Dy. 2. El. 189.*

There is an Attachment put into this Writ, because it is not a *vicontiel* Writ, as the Replevin, but a judicial Writ founded on the Supposition of an Original unlawful taking, and likewise of continuing a Contempt, by not permitting the

the Sheriff to gage Deliverance.—
But it seems there had been no such Clause in the *Withernam*, if it had been a Complaint in the County, (vid. *ibm.* & 44. *Aff.* 15.) for the Sheriff cannot upon his Complaint, punish the Elopement, as a Contempt of the Authority of the King, since it is only a Contempt of the Process of his own Court, and therefore it seems that if a Complaint be removed by *Recordare*, which gives the Parties Day in Court, it shall go without such special Attachment, to Answer the Contempt of the Sheriffs Court below.—But if the Replevin had been by Writ, and such Writ had been removed by *Pone*, and the Sheriff had returned an *Elopement*, there it seems the Attachment for the Contempt had been in the *Withernam*, because there the Plaintiff had been attached for his Contempt to the King.

Note,

Reg. 83. 2. v. Note, this is a Writ *de Executione*
 Salk. 582. *ed Judicii*, and therefore recites the
 That the Withernam is on-award of the County Court as a
 ly Mesne Pro- Judgment.—But there is no At-
 cess, for it tachment for Contempt against the
 cannot be an Defendant, because the Proceeding
 Execution be- was not by the King.—And note,
 fore Judg- this Writ seems to be designed to
 ment. prevent the Sheriffs sleeping upon
 such Judgment of Withernam in
 his own Court, for though it be not
 returnable into any of the King's
 Courts, yet the King's Writs are
 always to be obeyed, and an At-
 tachment lies upon the Sheriffs
 Disobedience.

Dalt. Sher.
 437.

Note, The Sheriffs *Capias* in
Withernam must be in Writing, and
 not by Word only, because it is in
 Nature of a second Execution of
 the award of the County Court,
 and therefore not like the Plaint in
 Replevin, which for the suddenness
 of the Thing may be verbal only.

By

By the Statute of *Marlbr. C.* 3. ^{Dalt. 435}
the Sheriff has Power of Fining the 2. ^{Inst. 150.}
Defendant that refuses to deliver the
Distress; and the Writ of *Wit-
thernam*, ought to rehearse the *F.N.B.* 71.
Cause which the Sheriff returneth,
for which he cannot Replevy, as
to say,

*Ac Postquam prædictus B. Cat-
talla vel Averia illa cepit, Catalla
vel Averia illa aut Bovem vel Equum
elongavit extra Ballivam tuam, ita
quod nullam deliberationem inde ei-
dem A. facere potuisti, sicut nobis
significasti, nos, &c. tibi precipimus
quod Catalla vel Averia, &c. præ-
dicti B. sine dilatione cap, in
Witthernam, & ea detineas donec ei-
dem A. &c.*

And there are very many Causes,
that the Sheriffs may Return upon ^{Reg. 21.}
the *Pluries*, wherefore he cannot
Replevy them, whereof divers of
P them

them do appear in the *Registrar*, which a Man may there see.

And if the Sheriff do Return upon the *Pluries Replevin*, that he hath sent unto the Bailiff of the Liberty, who hath Return of Writs, &c. and that the Beiliff hath given Answer that he cannot execute the Writ, because he cannot have a view of the Cattle or Goods which were taken, then the Court in which such Return is made, shall award a *Witbernarn* directed unto the Sheriff, and the Sheriff shall thereupon make his Precept unto the Bailiff of the Liberty, and if the Bailiff of the Liberty doth not make a Return thereof unto the Sheriff, then the Sheriff shall Return the whole Matter in Court, and thereupon the Court shall award a Writ of *Witbernarn*, and a *non omittas* with the same, and the Form of the Writ shall be such,

Rex

Rex Vic. B. Salut. Cum plur. &c. usq; ibi, vel non potuisti, ac R. de C. Balli. Libertat. I. cui return. brev. nostr. habere fecisti, tibi responderit, quod Executionem Brevis illius facere non potuit &c. sicut tu nobis Significasti, per quod tibi preceperimus quod averia predicti B. in Balliva tua sine dilone caperes in Withernam, et ea detineres donec eidem A averia sua &c. inde direct. vel. Causam nobis Significares, &c. vel tu non potuisti, ac tu nobis returnaveris, quod idem R. Balliv. Libertat. præd. cui return. &c. habere fecisti, nullum tibi inde dedit respons. tibi precipimus quod non omittas propter Libertat. prædictam quim eam ingrediaris &c. Capias in Withernam, donec, &c. Juxta, &c. prius tibi, &c. Teste, &c.

And if a Man's Cattle be dis-^{1. Marl. c. 22.}trained, and he sue a Replevin, by^{West. 1. c. 17.} Plaint made unto the Sheriff, for
P 2 which

which the Sheriff makes a Precept to the Bailiff to replevy them, and the Bailiff return at the next County Court, that he cannot Replevy the Cattle, because they are eloigned, or that he cannot have View of the Cattle, then the Sheriff in the same County Court ought to make enquiry if it be true, which is returned, and if it be so found by the Jury, then the Sheriff *ex Officio*, * shall make a Precept unto his Bailiffs in the nature of a *Withernam*, to take as many Cattle of the other Party's.—And if the Sheriff make such Precept, to take the others Cattle in *Withernam*, and the Bailiff will not Execute the Writ, then the Party may have a Special Writ out of the Chancery, directed unto the Sheriff, Commanding him to do *Withernam*, and to do Execution of the first Judgment, and the Writ shall be such,

Rex

* See the Register 82. where it is said, he is not bound to do it without a Writ.

. Rex Vic. &c. Monstr. nobis A. quod cum B. & C. averia prædicti A. cepissent et injuste detinuis-
sent, idemq; A. coram te prosecu-
tus fuisset, pro averiis prædictis
sibi secundum Legem, et Consue-
tud. Regni nostri replegiandis, ac
licet per J. Ballivum tuum, quem ad
Averia prædicta, prædicto A. re-
pleg. misisti, Testatum fuerit, et
per Inquisitionem (prout moris est)
in pleno Com. tuo factam compertum,
quod idem Balliv. visum de eisdem
averiis habere non potuit, ad eadem
præfat. A. Replegiand. per quod in
pleno Com. tuo Consideratum fuit,
quod averia prædict. B. & C. in
Balliva tua caperentur in Witber-
nam, & detinerentur quosq; eidem
A. averia sua prædicta Secundum
Legem et Consuetud. Regni nostri;
Repleg. possint; idem tamen A.
Executionem Considerationis prædic-
tæ nundum affecutus est, ad Dam-
num ipsius A. non modicum et
Gravamen,

Gravamen, et quia præfato A. Subvenire Volumus in hac parte, tibi precipimus quod si ita sit, averia prædictorum, B. & C. cap. in Withernam et ea detineas, quousq; eidem A. averia sua prædicta Repleg. possis, secundum Legem & Consuetud. Regni nostri & Juxta Consideration. prædictam, &c.

And further by this it appears, that the Sheriff may award *Withernam*, on Replevin sued by Plaintiff, if it be found by Inquest in the County, that the Cattle are Eloigned according to the Bailiffs Return, &c. But upon the *Withernam* awarded in the County, if the Bailiff do Return that the other Party hath not any Thing, &c. he shall have an *Alias* and a *Pluries*, and so infinite; and hath no other Remedy there, because no *Capias* lies but in the King's Courts.

But

But upon a *Witbernarn* returned in the King's Bench or Common Pleas, if the Sheriff do Return that the Party (a) hath not any Thing, &c. there a *Capias* shall be awarded against him, and *Exigent* and Process of Outlawry.

In Replevin sued by Writ, if at F.N.B.74.D. the *Pluries* returnable, the Sheriff doth Return, *Quod averia Elongata sunt*, &c. now if the Defendant appear, the Plaintiff shall not have a *Witbernarn*, because the Defendant appears at the Day when the Sheriff returns the *Pluries*, which is a voluntary Appearance, since there is no Day given him, therefore he has Time to purge his Contempt, by gaging Deliverance of the Cattle ; but if he doth not gage Deliverance of the Cattle, it seems they may either

(a) See 28 E. 3. 57. and a *fiat alias* there granted.

either award a *Withernam*, or Commit him for his Contempt; and if the Defendant's Cattle be taken in *Withernam*, they shall not be delivered to the Plaintiff, but the Sheriff shall keep them *Quousque*, &c. and the same appears by the Words of the Writ: (b) But its said that its the Usage in the King's Bench, that they shall be delivered unto the Plaintiff, by which it seems that the Form of the Writ of *Withernam* there is different from that in the Register.

This is a Point that has been several Times controverted, and some of the

(b) See the like Diversity, 2 H. 4. 9. yet *Quare Rast. ent.* 702, 704, that the Clause of the *Withernam*, Whether for the Plaintiff or Defendant is *Quod Vicecomes capiat in Withernam*, &c. & *ex pref. A. deliberet, detinenda quousque* &c. so is the Entry in *Bredon's Case*, 1 Co. 75, and which was in the Common Pleas, see 25 E. 3. 4. 7. but more fully in *Gage Deliverance* 8. where the Sheriff in his County levies Goods of the Plaintiff in *Withernam*, after a Return hath been awarded on a nonsuit, if he doth not deliver them to the Defendant, he shall have an Action against the Sheriff.

the Clerks made the Distinction, ^{2 H. 4. 9.}
 between the Practice of the King's Br. With. p. 3.
 Bench, and Common Pleas ; but the ^{Raft. 702. 704.}
 true Distinction is between the Ori- ^{Co. ent. 612.}
 ginal and Judicial Writ of *Withernam* ; by the former the Sheriff is
 to take & *ea detineas donec eidem*,
 &c. which obliges the Sheriff to
 detain the Beasts in his own Custo-
 dy ; but in the Judicial *Withernam*
 the Words are, *Capias in Withernam*,
 & *salvo & secure custodiri facias, donec*
 &c. which is to be interpreted, that
 he must deliver them to the Plain-
 tiff upon good Security, for that
 is making them to be safely kept.

The Reason of the Difference is
 this, that on the *Vicontiel* Writ below,
 where it was found that the Beasts
 were Eloigned, the judicial award
 of taking the Defendants Beasts,
 could be only *quousque*, he gaged
 Deliverance, because every Execu-
 tion in the Sheriffs Court was no
 more than the levying a Pain, to
 Q make

make the Party perform the Sentence of that Court; for they could not execute the Sentence of that Court, by changing the Property, or delivering it over to the Suitor, but by levying Pains to make them perform it; and therefore when the Return of *Elongata* is made into Chancery, the *Withernam* then goes out as a *vicontiel* Process; and is therefore conceived in the same Manner as it is below; and in the Writ *de Executione facienda in Withernam*, there is no Return into the King's Courts; but where the *Elongata* is returned into the King's Bench or Common Pleas, there the *Withernam* goes out as a judicial Process, and there the Courts who can alter the Property, have made it *Secundum Legem Talionis*, viz. that the Defendants Goods shall be delivered to the Plaintiff to make use of till his own are restored, and it was said to be the Practice of the King's Bench, because that was the Court

Court where the *Lex Talionis* in Case of Murder, and *Mayhem* first settled the Practice.

On a *Recordare*, the Plain-^{25 E. 3. 90.}
tiff declares, and the Defendant ^{Fitz Gage}
^{Deliver. 1.}
avows; the Plaintiff prays the Defendant may gage Deliverance, and the Defendant pleads that part of the Beasts were delivered, and the other dead through the Plaintiff's default; to this the Plaintiff replies, that he commenced a Replevin by Plaint, that the Sheriff made Deliverance, and took Security to have return, or the value, that he was nonsuit in Replevin, and on this the Plaintiff took from him 20s. *per Withernam*, and of this he would have the Defendant gage Deliverance, and insisted that it ought to be delivered by the Defendant, because he had avowed the taking, and that therefore the Defendant was to have an Action against the Sheriff, and in order to have Deliverance, the

Q. 2

Plaintiff

Plaintiff was forced to take Issue, that the Sheriff delivered the 20s. to the Defendant.

Note, the Writ of *Witbernem* is *ad respondendum tam Domino Regi de Contemptu, quam Parti de Damno & Injuria*; for to Eloign the Goods was to stop the Replevin, and hinder the Plaintiff from pursuing his just Right, for which he was fineable to the King.

Raft. En. 708.
35 H. 6. 47.
2 Leon. 85.

If on the *Witbernem* the Sheriff Returns that the Defendant hath no Goods, a *Capias* Issues and Process of outlawry, and this was at Common Law, both in the Writ of *Witbernem* & *de proprietate probanda*, because on both these Writs, a Contempt is supposed and appears against the Defendant by the Returns of the Sheriff, and therefore the Party is fineable for his Contempt, and wherever there was a Fine for the King, a *Capias* lay at Common Law, as it did for a Trespass *vi & armis*,

armis, where there was a Fine for the King.—But 25 E. 3. C. 17. gives the *Capias* in Replevin, on that Attachment issuing to bring in the Defendant; but this *Capias* does not lie in the Sheriffs Court, for its given as in Account, which was always in the King's Courts on the Sheriffs Return of *nulla Bona*.

Where the *Return. Habend.* is awarded for the Defendant, *Witbernam*, *Capias*, and Process of outlawry lyes against the Plaintiff, because there likewise is a Contempt against the King.

And here we must take Notice, ^{1 Inst. 106.} that the Statute of *Marlb. C. 4.* which says, that *nullus de catero faciat ducere districtiones quas fecerit extra com. in qua Captus fuerint, & si, &c. Puniatur per Redemption. veluti de re facta contra Pacem,* and gives a Fine to the King upon an Eloignement returned by the Sheriff

Sheriff in the King's Court, is but in affirmance of the Common Law.

If the Sheriff Return that the Distress is Eloigned, so that he cannot deliver them upon the Replevin, or upon the *Returno Habendo*, the *Witbernam* goes, for where it appears there cannot be a Delivery made of the same, the Law commands an equivalent *Secundum Legem Talionis*.

F.N.B. 74. E.
Carth. 286.
4 Mod. 183.

In a Replevin at the *Pluries* returnable, if the Sheriff doth Return *quod averia Elongata sunt*, &c. and the Defendant doth appear, and plead that he did not distrain them, now the Plaintiff shall not have *Witbernam*, and so if the Defendant at the *Pluries* returned, appear and plead that the Cattle were dead in the Default of the Plaintiff, the Plaintiff shall not have *Witbernam*, for if he did not take them,
or

or if the Cattle be dead by the Default of the Plaintiff, then *Secundum Legem Talionis*, he ought not to have the Defendant's Cattle, and therefore while this is in Issue, no *Withernam* ought to be awarded.

Note, that if in Replevin, *Wi-*^{F.N.B.74.E.}
thernam is awarded, and afterwards ^{Note.}
the Defendant avows the taking as his proper Goods, or for a *Heriot*, or denies the taking, the Plaintiff shall gage Deliverance of the *Withernam*, for the *Withernam* ought not to have been awarded, but the Defendant shall not gage the Deliverance of the Goods taken, since he claims them as his own, yet the Defendant might have come in *Pais* and claimed the Property, but whenever he claims them its sufficient to stop the Deliverance,
30 E. 3. 9. If *Withernam* be taken and afterwards the Defendant comes into Court, and makes Conusance as Bailiff to J. S. and prays Aid of him,

him, who joins in Aid, the Defendant shall have Deliverance of the Beasts in *Withernam*, for it belongs to the Lord to make Deliverance of the first Beasts, and not the Bailiff, 7 H. 4. 28. *per Horton*, because the Bailiff took them only as a Servant, therefore his Cattle ought not to be taken as a Compensation for the Master's not restoring the Distress.

F.N.B.74.E. And the Defendant in some Cases shall have have a *Withernam* against the Plaintiff, as if the Defendant has a Return awarded for him, and he sueth a Writ, *de Returno Habendo* and the Sheriff Return upon the *Pluries, quod averia Elongata sunt*, &c. He shall have a *feri facias*, against the Pledges, &c. according to the Statute of *Westm. 2. c. 2.* and if they have nothing, then he shall have *Withernam* against the Plaintiff of the Plaintiff's Cattle, *quod vide, Tr. 7. R. 2. see 5 H. 5. 7.* the Avowant may have a *Withernam*

Witbern presently, for it was at the Common Law, 7. Ric. *Witbern* 11. he cannot have it before a *scire fac.* returned against the Pledges, in an Attachment against the Party, and for a Default of a Distress, Process of outlawry lies.

It has been doubted, whether on *West.* 2. c. 2. that gives Pledges *de Retorno Habendo*, it be necessary to sue a *scire facias*, and have a *nihil* returned, before you can have a *Capias in Witbern*, in as much as you must shew it impossible to have the Cattle returned, before you can by the *Lex Talionis* come on the Goods of the Plaintiff. But it seems that the better Opinion is, that the Statute only gives him another Security and Remedy by *scire facias* against the Pledges, and does not take away, nor alter the Remedy given by Common Law, 5. H. 5. 7. *Fitz. Process*, 115.

R

In

11 H. 4. 10. In Replevin, *Withernam* was
 Br. With pl. 5. awarded against the Defendant,
 F.N.B. 74.A. and afterwards the Defendant claims
 Note. Property, and they are at Issue, the
 Plaintiff gages Deliverance of the
Withernam, and a Writ issues for
 him to make Deliverance according-
 ly; the Sheriff returns *Elongata*,
 on which *Withernam* is awarded
 against the Plaintiff, and upon *nil* re-
 turned, a *Capias* Issued; then the
 Issue is found for the Plaintiff, upon
 which he had Judgment; now
 upon the Return of the *Pluries*
 against the Plaintiff, the Defendant
 prays an *Exigent* against him, *et*
Habuit; and by *Thirwit* the De-
 fendant shall recover Damages for
 the detaining of the *Withernam* in
 this Action; the Reason is, that as
 soon as the Defendant claimed Pro-
 perty, the *Withernam* Beasts were
 detained unjustly by the Plaintiff,
 and the subsequent Verdict, though
 found for the Plaintiff, did not make
 the detainer, which was in itself un-
 lawful

lawful, lawful *ex post facto*; for the Plaintiff could not detain Beasts in *Withernam*, when the Defendant claimed the Thing replevied as his own Property, and not as a Distress; for the *Withernam* proceeds on the Supposition, that the Original taking was a Distress, and if the first Beasts had been the Defendants, they ought not to be removed out of his Possession, much less ought other Beasts have been taken in *Withernam*.

Per Danby and Moyle, the De-Vide *Dyer* 41. Defendant shall recover Damages in *Withernam* on an *Elongata* returned, on a Writ *de retorno Habendo alii. contra*. If the Reason of the Doubt is, because if the *Retorno Habendo* be entirely to right the Defendant, Damages must be recoverable, in Case the Beasts be Eloigned.—The other Opinion is, that it is only a judicial Writ to cause the Beasts to be returned; but the better Opinion is, that he shall have Damages, because by

the Eloignement he is deprived of the Benefit and Use of the Beasts, which he ought to have been immediately put in Possession of, in Pursuance of the Judgment.

If the Plaintiff be nonsuit, he may have a second Deliverance presently, and this shall be a *Supersedeas* to the *Returno Habendo*; and if the *Returno Habendo* be sued after the second Deliverance granted, the Sheriff ought not to Execute the second Deliverance: Now this prevents the Mischief of the *Witbernam* against the Plaintiff.

F. N. B. 74.
A. Note.

A. brings Replevin against *B.* and has Deliverance, and after is Nonsuit, and a Return awarded to *B.* and upon this an *Elongata* being returned, *B.* has the Beasts of *A.* in *Witbernam*.—In this Case, if the Plaint was first in the County, and removed in *C. B.* the second Deliverance must not be sued of the Beasts delivered in *Witbernam*, but
of

of the Beasts first taken, and the Defendant shall be put to gage Deliverance of the *Withernam* (*quod nota,*) and yet the Plaintiff himself is possessed of the Beasts whereof he Complains; and if he makes his Complaint, or Count of the Beasts delivered in *Withernam*, it is not good.—25. E. 3. 90, pl. 38. 33. E. 3. *Avowry*, 256. 13. E. 3. *Replevin* 37. *Pluries* 3. *Dyer* 59. accordingly *per Cur.* in second Deliverance; the Reason is before given, for the second Deliverance is a judicial Writ appointed by the Statute, and therefore must in all Points pursue the Record out of which it Issues; and the Plaintiff cannot declare on that *Withernam*, for this is the award of the Court upon his Eloigning the Cattle, and if he is injured by the Return of the Sheriff, he has his Action against him.

If the *Withernam* be awarded Offic. Brev. Title *Withernam*. against the Defendant, on behalf
of

of the Plaintiff on *mesne* Process, the Sheriff may take the Beasts of the Defendant to any Value, as a Pain to make him appear, and when the Defendant comes in, he will be fined in Court and committed till he has paid that Fine, and gage Deliverance of the Beasts, and then he can have his own Goods restored, that were taken in *Withernam*, and interplead with the Plaintiff; and here he cannot plead that either he did not Eloign, or that the Beasts were dead in Pound, for that is contrary to the *Elongata* returned by the Sheriff, and not to be denied; but if it is false, he has remedy against the Sheriff for his false Return.

Qu. vide Salk.
581.
L. Raym. 613.

If on the *Withernam* awarded against the Defendant, *nulla Bona* be returned, a *Capias* Issues against the Defendant, and on that *Capias* if the Defendant be taken, he shall be in Custody until he has paid the Fine, and likewise gaged Deliverance;

ance; and if he be not taken, they proceed to Process of Outlawry.

Upon the *Returno Habendo*; if W. 2. c. 2. Vide Ante. the Sheriff returns *Elongata* on the Plaintiff, then there is some difference in the Books, whether they must proceed against the Pledges to have them amerced, and have Issues returned against them, to the Value of the Beasts; or if they have nothing then to do, but to take a *Withernam* against the Plaintiff. But it seems by the better Opinion as is here before mentioned, that they may have a *Withernam* immediately against the Plaintiff, on an *Elongata* returned by the Sheriff, and on such *Withernam*, they may take all the Beasts of the Plaintiff, until he has returned the Beasts to the Defendant; for it is a Pain to make him do the Thing required.

By the Judgment of a *Fieri Facias*, *Capias* and *Elegit*, lyes on the
award

award of the Judgment, if on the *Withernam Bona* be returned, then the Plaintiff's Goods are taken, and they shall not be delivered until the Plaintiff has paid his Fine to the King for his Contempt, and delivered his Beasts; if *nulla Bona* be returned on the *Withernam*, a *Capias* issued at Common Law against the Plaintiff for his Contempt, and if on the *Capias* the Plaintiff be taken, he shall lye by it until he has satisfied the Fine for his Contempt, and returned the Goods.

But by 17. C. 2. 7. if the Plaintiff in Replevin be Nonsuit, before Issue joined, the Defendant is to make a Suggestion, in Nature of an avowry or Cognisance, for his Rent, and on this a Writ of Enquiry issues to ascertain the Arrears of Rent, and the Value of the Distress, and he shall have Judgment to recover the Rent, and Costs of Suit out of the Goods, if they are sufficient,
if

V. *Of the Writ de Proprietate Prebenda.*

Reg. 83.84.85
Brev. Jud. 135.
Co. Lit. 145.
S.H. Rep 35.
Prop. Prob. 4.

troverly of Property can be determined in the County Court, without the King's Writ.

Dalt.She.435. On the purchasing of this Writ, an Inquest of Office is holden, and if on such Inquest the Property be found for the Plaintiff, the Sheriff is to make Deliverance; but the Defendant may remove it by *Recordari*, and put in his Plea of Property above, and it shall be determined by a Verdict; but if the Inquest of Office find for the Defendant, there is an End of the Replevin by Plaintiff, because the Property is found for the Defendant, and so no Rede-liverance can be made by the Sheriff; but the Plaintiff may bring a new Replevin by Writ, for what is done on the Plaintiff is no Bar, nor has it any Concern with the Proceeding upon the Writ.

But if the Replevin were by Original Writ, and the Defendant claims Property, the Sheriff cannot make Deliverance

Deliverance, no more than he could upon the Plaintiff, and therefore the Sheriff in such Case returns such Claim of Property, on the *Causam nobis significes*, on the *Alias* and *Pluries* on the Replevin, as a Cause why he cannot Execute the Writ; and on this Return of the Sheriff, the Writ *de Proprietate Probanda* issues, that the Plaintiff may not want his Beasts in the mean time, and if the Property be found for the Plaintiff, orders a Re-deliverance to the Plaintiff, and gives the Defendant a Day in Court; and the Plaintiff may not only declare on the unjust Caption, but on the subsequent Injustice of the Defendant, in claiming the Goods as his own; and here the Defendant may likewise set up his Claim of Property, and try it over by Verdict, where the Matter will be determined under Peril of an Attaint.—But if this Claim be found against the Defendant on the Inquest of Office below,

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he is subject to a Fine for his false Claim of Property, whereby he has stopped the Course of Replevin, by hindrance of the Deliverance of the Goods, which is a Contempt of the Court, and subjects him to a Fine, as likewise to Damages to the Party, who wants his Goods in the mean Time. The Defendant must appear in proper Person to answer his Fine to the King, but after Payment of the Fine he may appear by Attorney; but until the Payment of the Fine, he must plead in Person.

Brev. Jud.

135, 136, 137.

But if the Verdict be found for the Defendant in the Writ *de Proprietate Probanda*, there is an End of the Replevin, as well by Writ as by Plaint; for the Sheriff is not by the Writ *de Proprietate Probanda* to deliver the Goods to the Plaintiff, unless the Jury finds them to be the Plaintiff's; and if the Defendant has the Goods and possesses them as his own, they cannot proceed on an Action,

Action, which supposes the Goods to be re-delivered to the Plaintiff; but if the Plaintiff has any Right to them, since the Possession by the Inquest is established on the Side of the Defendant, the Plaintiff cannot get back his Possession of the Goods, until he has established his Right in an Action of Law for the same, and therefore he may bring his Action of Detinue, Trover or Trespass, for the recovering of the Goods, but cannot continue his Action, whereby the Possession should be delivered to him. *Fitz. Propr. Prob. 5. et per tot.*

A Bailiff cannot claim Property below, when the Sheriff comes to make Replevin, because being only Co. Lit. 145. Q. 1. Lev. 90. Servant to another, in whose Right he has taken the Goods, he cannot say they are his own, and therefore cannot hinder the Sheriff from delivering the Goods according to the Command of the Writ, as the Proprietor

Bro Jud. 137.

Theo. Brev.

170.

prietor might.—For though a Man by claiming Property, may prevent his own Goods being delivered, yet he cannot hinder other People's Goods, because the Sheriff cannot hear any Stranger to interpose against the obeying the King's Writ; but the Owner himself shews a just Cause why the Goods should not be delivered, until further Enquiry; but the Bailiff above may plead Property in a Stranger, for this is a sufficient Reason to Excuse him from Damages, since he has not taken the Plaintiff's Goods from him.

VI. *Of the Process for removing the Cause out of the inferior Courts.*

Since the Replevin is *Vicontiel*, and determinable in the Inferior Court, where the Suitors are Judges both of the Law and the Fact, and since the Suitors are not awed by the Peril of an attain, nor the Matter of

of Law determined without Danger of false Judgment, from their Ignorance or partiality, the Law hath appointed two Writs to remove such Causes out of inferior Courts into the superior, and those are the *Pone* and *Recordare*.

The *Pone* is when the Proceeding² Inst. 339. is by Writ of Replevin, for when a Writ of Replevin issues, and it is returned out of the County Court, that gives the Judges above Authority to proceed thereon, whether the Proceeding below be recorded or not, for the Judges want no Record from below, when they have the King's Writ with them.

But the *Recordare* is to Record the Proceedings, and when recorded to return them into the King's Bench or Common Pleas; so that it gives Authority to Record those Proceedings, that were not of Record before; therefore if the Replevin

plevin were by Plaint, it must be removed by *Recordare*, because the Courts must have their Authority by Proceedings returned of Record.

We shall consider each of them separately.

I. Of the *Pone*.

F.N.B.69.M. If the Replevin be removed out of the County Court into the Common Pleas, the Writ of *Pone* shall be as follows :

Rex Vic. Linc. Salutem. Pone, ad Petitionem petentis, coram Justiciariis nostris apud Westm. (tali die) loquilam quæ est in Com. tuo per breve nostrum, inter A. & B. de Averiiis ipsius A. captis & injuste detentis, ut dicitur, & Summoneas per bonos Summonitores præd. B. quod tunc sit ibi, præfato A. inde responsurus, & habeas ibi Summonitores & hoc breve.

And

And if it be removed into the King's Bench, then the Writ is such :

Rex, &c. Pone ad Petitionem petentis, ubicunque tunc fuerimus in Anglia loquelam, &c.

The Reason why he is summoned in this Writ, is that the Defendant being already attached in the Court below, and having appeared, it is presumed he would have come in upon the Summons, and when he hath appeared below, to avow his Distress, it is not to be supposed that the Caption is an unlawful Caption, on which he should be attached; and therefore when the Plea is removed, the Entry is, *Quod defendens Summanitus fuit ad respondendum.*

The Plaintiff may remove out of the County Court, either by *Pone,*

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or

or *Recordare*, without Cause shewn; for it is his own Delay, but the Defendant cannot remove without Cause shewn, for since it is in Delay of the Plaintiff, a just Cause ought to appear upon Record for such Removal.

Reg. 84.
F.N.B. 70.A.
2 Inst. 339.

There are several Causes of removal at Common Law; as if either Party were related to the Lord, or Sheriff, &c. but the *Stat. of West. 2. c. 2.* hath added one Cause, and that is, if the Defendant distrains for Custom and Services, and the Plaintiff pretend to be out of his Fee; for by this means the Plaintiff recovered his Beasts, and drove the Lord to his Custom and Services, whereby the Lords were often dispossessed of their Distresses; and therefore this Statute provided that such Defendant should upon such Pretence of the Plaintiff, remove the Plea into the superior Courts,

Courts, and try the Tenure in this Action.

And the * Cause of Removal is inserted in the Writ, after the *Teste* thereof, in this Manner ;

Quia C. Clericus D. Vicecomitis prædicti qui frequenter in absentia Vicecomitis illius tenet placita ejusdem Comitatus, est Consanguineus prædicto, A. propter quod idem Vicecomes favet ipsi A. in loquela prædicta ut dicitur. Fiat executio istius brevis, si causa sit vera & præd. B. petit, & aliter non.

Or thus : *Quia præd. B. cepit averia præd. in feodo suo pro Consuetudinibus & servitiis sibi debitis, ut dicitur. Fiat executio, &c. ut supra.*

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Or

* The Sheriff cannot Return that the Cause is not true. *per Rolph. 7 H. 6. 32.*

Or thus : *Quia præd. B. clamat præd. A. esse Nativum suum, Et eâ occasione asserit averia præd. esse sua propria, propter quod loquela illa in Comitatu deduci non debet, ut dicitur. Fiat executio, &c. ut supra.*

10 Ed. 2. A- But notwithstanding the said
vowry, 213.
515. 20 Ed.
3. Avowry. for *Damage-feasant* ; for the
130. Cause of Removal is no material
Part of the Writ, nor is it traverse-
able, and therefore the Defendant
may justify the taking and detention
of the Distress, in any other Man-
ner,

F.N.B.70.A. But if either Plaintiff or Defen-
dant removed the Suit out of the
Lords Court, they ought to shew
Cause, because they should not oust
the Lord's Court of the Profits of
such Jurisdiction, without apparent
Reason.

And

And it seems that such Causes used anciently to be examined, before such Writs were granted, as in Chancery they used to examine the Cause of Action before the granting of Original Writs; but this in both Cases is now neglected, and such Writs issue of Course.

And the Cause of removal out of the Lord's Court shall be shewn in this Manner : F.N.B. 70. A.
Reg. 84. b.

Quia prædictus Abbas est Dominus Curia de C. in qua loquela illa pendet per retorum brevis nostri, propter quod idem A in loquela præd. in eadem Curia justitiam consequi non potest, ut dicitur. Fiat executio, &c.

Or thus : *Quia I. Ballivus K. Archiepiscopi Cantuar. Curia sue de N. coram quo loquela illa pendet, per retorum brevis nostri in eadem curia,*

curia implacitatur per præd. B. de quodam debito 20. Marcarum, coram præf. Justiciariis nostris per breve nostrum, propter quod idem Ballivus in odium ipsius B. favet ipsi A. in loquelâ suâ præd. ut dicitur. Fiat executio, &c.

And note, that the former Conclusion is proper, when the Plea is removed at the Suit of the Plaintiff, but the latter when it is removed at the Suit of the Defendant.

21 H. 6. 50.
F.N.B. 70 A.
in the Notes.

If the Plaint be removed by the Defendant by *Pone*, at the Day in Bank, the Plaintiff shall be demanded under the Peril of a Nonsuit, and if he make Default, a Return shall be awarded, and no Process; but if the Plaintiff appears, and the Defendant makes default, a *Distringas* shall issue, and on *Nulla bona* returned, then a *Capias* and Process of Outlawry. So if the Plaint be removed by *Pone* or *Recordare*

cordate by the Plaintiff, there if he makes Default, he shall be Nonsuit; if the Defendant makes Default, then shall Issue a *Pone per vadios*, and so Process of Outlawry.

Wherever the Defendant hath Day in Court by the Writ, there the Plaintiff is demandable under Peril of a Nonsuit; for he bringing another in, ought to attend himself; and if he has brought the Defendant into the Court below, if the Defendant removes it above, he thereby gives himself and the Plaintiff a Day in the Court above; for the Plaintiff, having put in Pledges of Prosecution, ought to follow the Writ, and wherever Day is given, there he may demand the Plaintiff, under Peril of a Nonsuit; but where Day is given to the Defendant by the Writ, there no Judgment can be against him, 'till he appears, for that would be to give Judgment *parte inauditâ*; and therefore tho' he

he himself removes the Plaint by *Recordare*, whereby he gives himself a Day in the superior Court, if he does not appear at the Day, they must carry on the Process, to make him appear, tho' he has appeared in the Courts below, since such Appearance does not give Authority to the Court above to proceed, unless he has first appeared there; but there is Judgment of Nonsuit against the Plaintiff if he does not appear, for his Non-appearance is not prosecuting his Plaint, which is a Nonsuit.

3 H. 6. 2.
F.N.B. 69.M.
in the Notes.

Pone (at the Suit of the Defendant) *loquellam quæ est in Comitatu tuo inter A. & B. de Averiis ipsius A. captis, &c.* and says, *præfato B.* where it should be *præfato A.* *Rolph* came for *A.* the Plaintiff, and prayed Damages, for that otherwise the Plaintiff had no Remedy; for the *Pone* is abated, so the Court is without Warrant: Yet it shall not be

be remanded, for the County Court^{12 H. 4. 14.} and the Courts above, are the^{3 H. 6. 2.} Courts of the King; and a new^{4 Inst. 266.} *Pone* doth not lie, because the *Plaint* is here. *Baker, Martin* and *Preston contra*, a *Pone* or *Recordare* is but to remove the *Plaint*, so that when the *Plaint* is removed, the *Pone* or *Recordare* shall never abate, for that the Court is possessed of the *Plaint*; but yet the *Plaintiff* hath not a Day in Court, because such *Writ* not being good, cannot give the *Plaintiff* or *Defendant* a Day; therefore the Court may take a special *Writ* to the *Sheriff*, to warn the *Plaintiff* to pursue the *Plaint*, and so it was done in this Case.

The *Plaint* is well removed, altho' ^{F.N B 69.M.} the *Pone* bear date before the *Plaint* in the Notes. entered. 1 R. 3. 4. So if the *Plaint* be removed by *Certiorari*, where it ought to be *Pone* or *Recordare*. See 7 E. 4. 23. So if one *Plaint* be removed where another ought to have been, *ibid.* or
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It appeareth that the Plaintiff may remove the Plaint by *Recordari*, without any † Cause put in the Writ; but the Defendant cannot remove the Plaint, without shewing Cause in the Writ, as is before said upon the *Pene*. And the Causes for the Defendant ought to be such:

Quia

† If the Plea be removed out of the Court of the Lord, (in ancient Demesne, *ut videtur*) the Cause is traversable, *contra*, if out of the Court of the King. 12 H. 4. 17. 31 Ed. 3. *Fitzb. Cause de remover Plea* 10. And if the Cause be insufficient, or none at all, yet the Parol shall not be remanded; otherwise, if in ancient Demesne; for upon a *Recordari* out of ancient Demesne, the Plea is wholly upon the Cause, and therefore the Plaintiff may be Nonsuit in such *Recordari*; but if it be out of any other Court, the Plea is upon the meer Matter, and therefore the Plaintiff cannot be Nonsuit upon the *Recordari*, but it must be in the Action; the reason is because ancient Demesne is a Priviledge going with the Soil, (such Manors being anciently composed of the King's Husbandmen,) and the Pleas cannot thence be removed without Cause, because it would alter the Condition of the Soil, to be impleaded in the King's Courts, without such real Cause made out.

Quia præd. B. placitando in Com. præd. asserit se averia præd. cepisse in seperali solo suo, ut in damno suo ibidem, in quo quidem solo præd. A. clamat communiam pastura, ut dicitur; que quidem loquela, eo quod tangit liberum tenementum (ut prædictum est) in eodem Com. secundum legem & Consuetudinem Regni nostri sine brevi nostro placitari non debet. Fiat executio istius brevis (si Causa sit vera) & præd. B. hoc petat & aliter non.

And if a Replevin be sued. I by Plaint, in the Court of any other Lord, than in the County Court before the Sheriff, then the *Recordari* which is, sued by the Plaintiff or Defendant, shall be directed unto the Sheriff, and the Writ shall be thus:

Rex, Vic. Linc. Salutem. præcipimus tibi quod assumptis tecum quatuor

quatuor discretis & legalibus Militibus de Com. tuo. in propriâ personâ tuâ accedas ad Curiam W. de C. & in illâ plenâ Curia recordari facias loquelam quæ est in eadem Curia sue brevi nostro, &c. et recordum illud habeas sub sigillo tuo, & sigillis quatuor legalium hominum ejusdem Curie qui recorde illa interfuerint, & partibus, &c. (ut supra) quia præd. A. est Ballivus præd. W. de C. Curie sue præd. & tenet placita ejusdem Curie, & Judex in sua causa esse non debet.

If the Plea be discontinued in the County, yet the Plaintiff or Defendant may remove the Pleint into the Common Pleas or King's Bench by *Recordari*, and it shall be good, and the Plaintiff shall declare upon the same, and the Court shall hold Plea upon the same Pleint; for if the Pleint be † continued in the County

† If the Defendant be without addition in the Pleint, he shall not have addition in the *Recordari*

County Court, and issue joined upon it, yet nothing shall be removed but only the Pleint, and in the Common Pleas, the Plaintiff may declare *de novo*.

For the *Pone* and *Recordari*, give the Defendant a Day in the Court above, and when at Common Law the Plaintiff and Defendant appeared at the Day, the Plaintiff counted and declared, and the Defendant avowed *ore tenus*, that the Court might know the Cause

altho' the Process of Outlawry lie thereon. 2 H. 5. 6. (30 H. 6. 30. accordingly) adjudged. For the Plea is not held on a Writ, (but a Pleint only) and so not within the intent of the Stat. of 1 H. 5. c. 5. which speaks only of Writs Original, &c.

Note, a *Capias* lies on a Default made by the Defendant, on a *Pone* brought by the Plaintiff in a Replevin by Pleint, but not upon a default, upon a *Justicies*. 3 H. 6. 54. see 14 H. 6. 21. Yet if a *Withernam* be awarded in a County, (after a *Pone*) the Plaintiff shall gage Deliverance of the *Withernam* here; for the *Recordari* made the Court judge of the whole Matter. 21 H. 6. 40. See 39 H. 6. *Recordari* 5. 20 Ed. 3. *Recordari* 10. 20.

Cause of Complaint, and being in a new Court, it was all to be rehearsed in order, that they might understand it; and this the rather, because being a superior Court, they were not bound by any Decision made on the Proceedings below, and this could be no inconvenience in Replevin at Common Law, where the Plaintiff may bring his Replevin *toties quoties*; and where the Defendant removed it, and gave another Day, it was upon Cause shewn of inability or partiality, in the Courts below.

But not only in *Pone* or *Recor-dari*, is the Court to take no Notice of any Pleadings or Proceedings but what are rehearsed or recorded before them, but even in a *Habeas Corpus* which is a Writ of Liberty, there the Plaintiff must likewise follow the Body of the Prisoner, and there declare against him *de novo*; for the Court cannot take Notice of
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your Pleadings rehearsed before inferior Judges; for those Records don't come up before them, but by Writ of false Judgment, where the Court is not of Record, or by Writ of Error where it is, and therefore they have nothing to do with their Proceedings, till there be Judgment against them.

But where they have the Body of the Defendant, the Plaintiff may Proceed originally against him; for in *Replevin*, where they have the original Writ they may proceed originally upon it, and the Recorder makes the Plaint of Record, for the Statute of *Marlbr.* which gives the Plaint does in the first Chapter, provide that all Complaints of Distresses should come into the Courts of the King, which gives the King's Courts Authority to record such Plaint as was in the County.

The Words are, *Et præterea, quidam eorum per Ministros Domini Regis Justiciari non permittant nec sustineant quod per ipsos liberentur distractiones quas Authoritate propria fecerint ad Voluntatem suam, Provisum est Concordatum et Concessum quod tam Majores quam Minores Justiciam habeant & recipiant in cura Domini Regis, & nullus de cætero ultiones aut distractiones faciat per voluntatem suam absq. Consideratione Curiae Domini, si forte Damnum vel Injuria sibi fiat unde amandas habere voluerit de aliquo Vicinio suo, sive majore sive minore.*

By this Statute it appears that the Plaint tho' given for Expedition before the Sheriff might at any Time be removed and recorded in the Court of the King.

be

In a *Recordare* to remove a Record out of antient Demesne the Writ shall say *Loquelam & Processum* and not *Recordum quod v. 36 H. 6.* by all the Justices, yet the form of the Register in the *Recordari* as before is said, is *et Recordum illud Habeas.*

In the Sheriff or Lord's Court, and in antient Demesne in all Replevins the Plaint is called *Loquela*, because it's not a Record, as it is in their Court, but in the *Accedas ad curiam*, the Transmission of the Plaint by the King's Writ under the Seals of four of the Suitors in the Presence of the Sheriff and four Knights, is called a *Record*, because it's sent to be a Record in the Courts above.

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9 H. 6. 58.
 vide Nat.
 Brev. 12.

Where by *Recordare* the Record was removed by the Sheriff out of the Court of Chancery at *Canterbury*, it was said, that the Court of *Canterbury* might have refused to obey the Writ; for being a Court of Record by Commission, the Plea ought not to be removed by *Recordare* but by *Habeas Corpus cum Causa* or *Certiorari*; and it was held that in as much as the Plea was come hither without Warrant, all was void, and that therefore the Court could not remand it; for the Record remained at *Canterbury*; and if no Proceeding there according to the Suit of that Court, it was discontinued. Yet *vide Reg. 6. 7. a.* a *Recordari* on a foreign Voucher out of *Chester*.

The Reason is because the *Recordare* is to return a *Loquela*, and when the Proceedings are in a Court of Record, it's not a *Loquela*, but a
 Record

Record in it's own Nature in the Court below.

Again, the *Recordare* supposes a Partiality in the Court below, which cannot be supposed in a Court of Record, acting under the King's Commission; nor have the superior Courts any inherent Right to judge of what any other inferior Court of the King is possessed of, 'till it comes before them by *Habeas Corpus cum Causa*, or by *Certiorari*. The *Habeas Corpus* is the Writ of Liberty. The Law hath that tenderness for the Liberty of a Man, that when any Person is imprisoned, he may purchase a Writ to any superior Court; and if any of these Courts see Cause on the Return to discharge him, he shall be freed; from hence it is that the Body must be sent, and the Cause of Imprisonment must be sent with it.

A Cert.

A *Certiorari* also is to return the Proceedings on another Ground: All inferior Courts are of definite and bounded Authority, and cannot award Execution out of the District; therefore least Justice should fail, Process of *Certiorari* goes to remove the Record into the upper Courts; and both these Ways have been used to give Jurisdiction to the upper Courts.

The *Certiorari* coming to remove a Record on Supposition, that inferior Jurisdictions may exceed their Bounds, they must send the Record in the Condition it was when the *Certiorari* came to them; but it stops their Proceedings from the Time they receive it.

If a Record be removed out of a Court of Record by a *Recordari*, it cometh in without Warrant, and the

the Court shall not hold Plea thereof.

But if a Record cometh in Court without a Warrant, the Party may sue a Writ directed unto the Justices, that they may proceed upon that Record *quod coram vobis residet*.

The Meaning of the Distinction is this, that when a *Recordari* is sent down to a Court of Record, to remove a Replevin there depending, they may proceed and not obey the Writ; because that Replevin is of Record in the King's Court, and consequently *in Curia Regis* according to the Statute, and therefore the Writ to make it a Record is *actum agere*; but if they do obey the Writ, and send the Record, they cannot afterwards proceed upon it, because they have sent it away from them, and the Court above cannot proceed upon Records of another, as they do in Replevin on the Plaint sent before

fore them by *Recordari*; and therefore there must be a Writ to give them Authority to proceed on the Record *quod coram vobis Residet*.

But they have an inherent Authority to see that other Jurisdictions do not exceed their Limits; and therefore when they send a *Certiorari* to remove such Record, they ought to proceed above on the Plaint entered in the County; yet the Record is well removed, because that both Courts are the Courts of the King. But if the Record be removed out of the Court of any other Lord by such Writ, which beareth Date before the Plaint, it is not good: the Reason is, because the Sheriff's County being held or farmed from the King, as immediate Deputy, the King may remove the Replevin out of the Sheriff's Court into his own without any Cause shewn; and therefore it's not material whether the *Recordari* be tested before

before the Plaintiff or not; but where the Record is removed out of the Lords Court, where there is a Jurisdiction by grant or Prescription, there must be Cause shewn for such Removal; and such Cause will be absurd if the *Accedas ad Curiam* bears Date before the Plaintiff, for that cannot be a Cause to oust the Lord of Jurisdiction, which was not in being at the Time of the Writ issuing; and tho' the Defendant cannot remove the Plaintiff without Cause, yet this is not to oust the Sheriff of Jurisdiction, but that the Plaintiff may not be delayed without good Cause shewn.

VII. Of Replevin it self, and herein are to be considered.

1. For whom and in what Cases it lies.
2. The Declaration in Replevin.
3. The several Pleas in this Action, and herein of the avowry.

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4. Of

4. Of the Judgment in this Action, whether for the Plaintiff or Defendant, and herein of the Writ *de Retorno Habendo*, and of the Writ of second Deliverance.

1. *For whom and in what Cases it lies.*

Bro. Rep. 29.

2 Ro. ab. 430.

Bro. Rep. 8

Doct. Pla. 314.

The Replevin lies as well for Goods in which I have only a qualified Property, as for those in which I have the absolute Property, as if Goods be laid in my Hands in Order to be delivered over to J. S. and J. N. takes them from me, I may have a Replevin against J. N. to bring back these Goods into my own Possession, because I have a right to the Possession of these against every Body but J. S. and therefore as J. N. is a Trespasser for violating that Possession, so I may qualify that tort he hath done by bringing the Replevin which complains of the

the unjust taking, and that *J. N.* detains them *contra Vadios & Plegios.*

So it is if Cattle be farmed to me to manure my Land, if they be taken out of my Custody, I may bring Replevin for them, because during the Term I have the Use of them, and therefore the Caption and Detention of them by any Person is unlawful, which is the Injury complained of in the Replevin; or I may have in this Case a special Replevin, setting forth my special Property.

If *A* takes my Goods by the Command of *B.* I may take the Replevin against both, because in Trespass, both are Principals, and equally guilty of the unjust Caption and unjust Detention.

If the Lord distrains the Beasts of the Tenant, and the Mesne puts his own Beasts in the Pound, in lieu of

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¹ Ro.ab. 430.
⁷ H. 4. 18
^{Bro. Rep. 14.}
^{54. 9. Co.}
of ^{22. 6. 23. a.}

of the Tenants, the Mesne may afterwards have a Replevin for his own Beasts, and the Lord can't plead that the Beasts of the Tenant, and not of the Mesne who is the Plaintiff in Replevin, were taken, because the Tenant having paid his Rent to the Mesne, the Mesne is thereby obliged to defend the Tenant from the Lords Distress, but this cannot be done unless the Mesne becomes Party to the Suit, and be substituted in the Peace of the Tenant.

By this Means the Mesne may shew the Services performed to the the Lord for which the Distress was taken, and consequently that the Tenant ought not to be disturbed, and hence it is, that the Writ of Mesne is allowed to the Tenant, to bring in the Mesne if he does not come in of himself, because the Tenant being a Stranger to the Transactions between the Lord and Tenant

Tenant, he cannot defend against the Lord but by the Mesne, and therefore where the Mesne is to take the Defence, it's but fit he should be allowed to pledge his own Cattle, and discharge his Tenants, and the Lord hath no Prejudice, because there is still a good Pledge to answer his Services if there be any due; so and for the same Reason it is, if my Lessor distrains my Tenant, I may put my Beasts in the Pound, in lieu of my Tenants, and then replevy them as if they had been originally taken.

Several Persons cannot join in one Replevin for several Chattels, where the Property of them is several, because where several Distresses are taken by the same Person of different Men; each hath a several and particular Injury done him, if the Distresses be unlawful, and therefore they can't jointly complain of an unjust Caption, and Detention, where

3. H. 4. 16
bro. Rep. 12.
Do& Pla. 315
Co. Lit. 145

where the Property is several; for what Reason have I to complain or to seek Redress in my own Name, for an Injury supposed to be done to another?

2 Rob.ab 430
Bro. Repl. 64
Doct Plac. 314

If Beasts which are *feræ Naturæ* be reclaimed by me, and are distrained or taken out of my Custody, I may have a Replevin for them; because I have a Property in them while they continue with me; but this Property only remains while they are in my Possession or retain the *Animum revertendi*; and therefore if they leave me of themselves, and another takes them while they are out of my Possession, and they have not the *Animum revertendi*, I cannot have a Replevin for them, because in such a Case I have no Property in them.

Lev. Ent. 152
2 Lutw. 1191
Rast. Ent. 275.
6. Bro. Repl.
p. 22.

If a superior Jurisdiction award an Execution, it seems that no Replevin lies for the Goods taken by the

the Sheriff by Virtue of the Execution, and if any Person should pretend to take out a Replevin; and execute it, the Court of Justice would commit them for a Contempt of their Jurisdiction, because by every Execution the Goods are in the Custody of the Law, and the Law ought to guard them, and it would be troubling the Execution awarded, if the Party on whom the Money was to be levied, should fetch back the Goods by a Replevin; and therefore they construe such Endeavours to be a Contempt of their Jurisdiction, and upon that Account commit the Offender. But if any inferior Jurisdiction issues an Execution, a Replevin will lie for the Goods taken by that Execution; because the inferior Jurisdiction being restrained within particular Limits, the Officer who took the Goods, is obliged to shew that he took the Goods within those Limits, and that the inferior Court which issued the

Execu-

Execution did not exceed their Authority in issuing it; besides an inferior Court of Record cannot commit for Contempt out of the Court: And hence it is, that the Officer of an inferior Court, is to shew by what Authority he took the Goods. Thus, in a Replevin the Defendant's were put to justify by a Condemnation before a Justice of Peace for not entering of strong Waters, and a Warrant on that for levying 20s Fine on the Plaintiff.

3 Lev. 204
Aylesbury;
Harvy.

3 H. 7. 1
Bro. Rep. p.
33 Vide ibid.
51 contr.

A Replevin doth not lye against the King, nor where the King is party, nor where the taking is in right of the King, and if such Replevin should be granted, the Sheriff ought to forbear to execute it, when he is informed the King is party; because all the Kings Debts are of Record, he taking nothing but Matter of Record; and therefore the Cattle are seized for the Kings Debts by the *Levari facias*, which is a Writ of

of Execution, and consequently no Replevin lies against the King, any more than it does for the Goods taken in Execution at the Suit of common Persons.

Executors shall have Replevin for the Goods of the Testator taken in his Life, because the general Property is in the Executors, and the Possession ought to follow that, and therefore the Executor may recover the Possession by this Writ of Replevin.

BroRepl.p.56
1. Syder. 80
Arundel v.
Trevyl.
Raft. ent.
560. 561.

If the Goods of a Feme Sole, be taken and she marries, the Husband alone may sue the Replevin, because the Property is transferred by the Marriage, and vested absolutely in the Husband, so that he may release it, and consequently he may have an Action in his own Name to bring back the Property.

Z

In

Bro. Rep. p.
41. 1 Syd. 82

In Replevin for a Sow and Pigs, the Defendant as to the Sow, avows *Damage Feasant*, and for the Pigs, pleads *non cepit*: The Jury found for the Defendant as to the Sow, and for the Pigs they found that the Sow furrowed them after she was distrained, and in the Possession of the Defendant, and the Plaintiff had Damages for the Pigs on this Plea of *non cepit*, because the Pigs were taken by the Defendant as well as the Sow, tho' they were not *Damage Feasant*; and therefore the Defendant should have set forth the special Matter as to the Pigs.

Bro. Rep. p. 34

No Replevin lies for Charters relating to the Inheritance, because the Charters are reckoned Part thereof, and as such descend with it to the Heir, and not being esteemed in Law Chattels, are not by Law replevifable.

A Re-

A Replevin doth not lie for Goods² Show 91.
 taken in foreign Parts, tho' after-v. Nightingale
 wards brought into the Realm, be-
 cause such a foreign Caption might
 have been justifiable according to
 the Law and Custom of the Place
 where it was made, tho' it may be
 illegal by our Law; and therefore
 such Caption ought not to be tried
 with us,

If Beasts be taken in one Country F. N. B. 69.1
 and carried into another, the Plain-Doct. plac.
 tiff may have his Replevin in either³¹⁵
 County, because it's a Caption in eve-
 ry County where they are taken by
 the Defendant,

This Writ of Replevin is always
 executed by the Sheriff, even in^{Regr. 81. 6.}
 his own Case, where he distrains the^{Bro. Rep. p. 65}
 Goods of another, because this
 Writ is a *Justicies* to the Sheriff, on
 which he is to hold Plea in his
 County Court; and therefore no
 Z 2 other

other can intermeddle in the Execution thereof but the Sheriff who is to preside over the Suitors as Judge therein.

II. Of the Declaration in Replevin.

And this is little more than a Transcript or Recital of the Writ it self, but in the Declaration you must not only alledge that the Defendant took the Beasts at such a Place, but also you must alledge the *Locus in quo*, as in *quodam Loca ibidem Vocato*, &c. for it's not enough to alledge such a Place from whence the *Venue* may come, but the Place must be so particularly specified as to give the Avowant an Opportunity to shew that he had a right to take the Goods in that particular Place, because the Right of the Caption may turn on the Place, and in this Action the Freehold may come in Dispute; and therefore it's necessary to specify the Place

Hob. 16.
Moor 678.
2 Mod. 199.
Doct. Pl. 315
Bro Repl. p 47
2 H. 6. 14
Cro. Eliz. 896
Ward. v. Savil

Place particularly wherein the Beasts were taken, which is Equivalent to the new Assigment in Trespass; and if the *Locus in quo* be not particularly specified in the Count, the Defendant may demur specially, and shew it for the Cause, for the Defendant may justify the taking in that particular Place for Causes he could not have any where else; but if the Defendant should plead *non cepit*, the Count would be good, because then the Place cannot be material when the Defendant denies the taking.

The Writ of Replevin is *quod cepit averia et injuste detinet contra Vadios & Plegios*, to which Writ the Sheriff return *Replegiari feri*,^{611.} there you go on in the Replevin only for Damages for the Caption, and then in the Count you recite the Writ in the *Detinuit*, and Count in the *Detinuit* for Damages, and tho' the Writ be taken out in the

² Lutw. 1150
Petreev. Duke
F. N. B. 69.l.
Co. Ent. 610.

the *Detinet*, yet when the Sheriff hath returned *Replegiari feci* upon it, that Return is a Warrant to recite the Writ in the *Detinuit*, for if the Writ was recited in the *Detinet* and the Count was in the *Detinuit*, it wou'd be a Variance for which the Judgment may be arrested, or the Defendant might have demurred: But where the Sheriff does not replevy the Beasts, there you must recite the Writ in the *Detinet*, and Count in the *Detinet* also, because the Beasts are not delivered, and there you recover as well the Value of the Beasts in Damages, as Damages for the Detention, and this is a shorter Way than to sue a *Withernam* and *Cap.* for a Return of the Beasts.

III. Of the several Pleas to this Action, and these are of four Sorts.

1. Pleas in Abatement.

2. The

2. The general Issue, *non cepit*.
3. The Justification, and this of two Sorts, either disaffirming Property in the Plaintiff or admitting it.
4. The Avowry.

I. *Pleas in Abatement.*

There is a Difference between Pleas in Abatement of the Writ in Replevin and in other Actions; for in other Actions, the Pleas in Abatement go merely to the Form of the Writ, because other Actions are for Debt or Damages, in which the Plaintiff hath no Possession of the Thing it self till Judgment and Execution, and therefore the Pleas in Abatement are to the Form of that Writ only, and all Pleas to the Right are in Barr of it.

But in Replevin, the Deliverance of the Goods is immediate, so the Plaintiff hath the Possession before
the

the Defendant can Plead thereunto; and therefore, according to the Genius of this Action, Pleas that are in Abatement must give the Defendant a Title to the return of the Beasts; for it's not enough merely to quash the Writ, as in other Cases where the Defendant is *in Statu quo* where the Writ is quashed, but in this Action, that the Defendant may be *in Statu quo*, he must not only shew that the Writ ought to be quashed, but that he ought to have a Return of the Beasts himself; and here the Pleas in Abatement differ only from the Pleas in Bar in this, that in the Abatement, they do not avow or acknowledge the Caption and Detention, which is the Gift of the Action, but they must go so far as to entitle the Defendant to a Delivery, or else they don't take away the Force and Effect of the Writ of Replevin, which is always executed by the Delivery.

Therefore in this Action the De-^{2 Lev. 92.}
fendant may plead Property in him-^{1 Vent. 249}
self in Abatement, for by such Plea^{Salk. 5. 92}
he doth not deny, or confess and^{Carth. 243.}
avoid the Caption, and therefore it^{L. Raym. 217,}
is not a Bar, but only shews that^{984.}
the Plaintiff hath not a Right to a
Deliverance, and by shewing that,
the Goods ought to be returned to
the Defendant on such Abatement,
as they were before the Writ was
taken out. But *quere*, for it seems
by the latter Authorities, that it
should be Plead in Bar.

If the Defendand pleads Property^{Mod. Caf. 81.}
in *J. S.* a Stranger, this may be in^{1 Vent. 249.}
Abatement; because he shews that
there is no Property in the Plaintiff,
and by Consequence that he had no
Right to a Deliverance by this Writ,
and therefore he ought to have Re-
turn without making any Conu-
fance.

A a

If

Mod. Caf. 103 If the Defendant pleads Property in the Plaintiff and *J. S.* there the Plea is in Abatement of the Replevin, as it is in other Actions, for tho' it admits a right of Deliverance in the Plaintiff, yet it does not allow it by a Writ under the present Form, but gives a better Writ to be brought by the Plaintiff and *J. S.* but here the Defendant ought to make a Conufance, because this Plea not disaffirming the Property, it leaves a right in the Plaintiff to have his Beasts, without such Conufance be made.

East. Ent. 554. As a Man may plead in Abatement of the Writ, so he may of the Count, and by abating the Count he doth in Consequence abate the Writ, and there it's pleaded *ad Narrationem & breve*, for if a Man doth not pursue his Writ by a regular Count, his Writ in Consequence is abated; and therefore if a Man declare of a Caption in *black Acre*, and the Defendant pleads in Abatement

ment of the Count, that he took them in *white Acre absq. hoc* that he took in *black Acre*, this will abate the Count under that Form. But then he must go over and make Conusance, because not disaffirming the Plaintiff's Title to the Beasts he leaves the Plaintiff a Right to retain; but this Conusance is not traversable where it is pleaded in Abatement, because the Plaintiff must maintain the Form of his own Count without falling on the Title of the Defendant, and if the Plaintiff should joyn Issue on the Traverse in the Plea of Abatement, and traverse the Conusance also, it would be double, which would be bad upon special Demurrer, and if the Plaintiff traversed the Conusance only, it would be a Discontinuance of the Plea in Abatement.

Cr. Eliz. 372.
Mod. Caf. 103.
Bro. Repl. pl.
31, 45.
1 Vent. 127.
Salk. 93.
Carth. 139.

But if a Justification for *Damage Feasant* had been pleaded in Bar, there the Caption and Detention

A a 2 accord-

Doct. Pla. 316.

according to the Form of the Writ is acknowledged; and therefore there the Plaintiff may traverse the Title of the Defendant, because the Defendant having acknowledged the Caption and Detention according to the Form of the Count, he hath put himself on the Strength of his own Title. So in the Case of Time, if the Plaintiff in his Count lay the Caption the 26th of *March*, and the Defendant pleads in Abatement, that he was possessed of the *Locus in quo* by Lease determinable the 25th of *March*, and that he took the Beasts the 24th of *March* Damage Feasant *absq. hoc* that he took them the 26th; this is a good Plea in Abatement only, because it goes only to the Form of the Plaintiffs Count; for the Time here becomes necessary to be laid in this Action, because the Defendant ~~may~~ have a right to take at one Time and not at another; but in this and every other Case in Abatement, where

where the Property is not disaffirmed to be in the Plaintiff, the Defendant must make Conuſance of a juſt Cauſe of return; for otherwiſe he doth not deſtroy the Force and Effect of the Writ, by which the Delivrance was made, but leaves the Plaintiff a right to retain his own Property.

II. Of the General Iſſue.

The General Iſſue in Replevin Bro. Repl. pl. 5 is *non cepit*; and here it's to be con- 1 Vent. 249. ſidered that the Caption and Detention is only in Iſſue, and not the Property; and in this Replevin differs from Treſpaſs; for in Treſpaſs where the general Iſſue is *non culp.* the Defendant may on Evidence ſhew a Property in himſelf, becauſe he cannot be guilty of Treſpaſs in taking his own Goods; but in Replevin, upon *non cepit*, the Property by the Plea is admitted to be in the Plaintiff, and therefore is not in

in Question at all, but whether the Defendant took the Goods mentioned in the Declaration; and he cannot be admitted on the Issue to shew where the Property was, because he hath put it in Issue only before the Jury whether he took the Beasts or not, and not whose they were.

1 Syd. 81, 82.
Arundal.
v.
Frail

In Replevin for a Mare and Colt, the Defendant pleads *non est Culpabilis de Captione prædictâ infra sex Annos ultimos elapsos*, and the Plea was over ruled; because it gives no Answer to the unjust Detention, which the Replevin complains of as well as the Caption, for the Caption may be just, and the Detention unlawful, as where the Defendant Eloigns the Beasts or drives them to a Castle, so that the Sheriff cannot replevy them at all, this is an unlawful Detention, however just the Caption might have been; and in the present Case it might be that
the

the Colt was foaled in the Pound, and then was never taken by the Defendant, yet it may be unlawfully detained; and tho' he might not have taken it within six Years, yet he might have detained it 'till the Day of the Purchasing the Writ, and that Detention is complained of by the Writ, and not bared by the Statute.

III. *Of the Justification.*

And there is some Difference between the Avowry, and the Justification; for the Justification confesses the Caption and avoids the injustice of it: The Avowry makes Title to such Caption of the Property of another: The confessing and avoiding the Caption may be *quoad* Damages only, the Avowry is always *pro Retorno Habendo*.

I. Of

Mod. Caf. 81. 1. Of Justifications that disaffirm
 2 Lev. 92 Property in the Plaintiff; as if the De-
 1 Vent. 249 fendant, acknowledges the Caption
 Bro. Repl. 3 and pleads Property in himself; this
 is a good Bar, because it confesses the
 Caption which is the Gift of the
 Action, but avoids the Injustice
 thereof, by shewing that he had a
 Right to take them; and this not
 only will abate the Writ of the
 Plaintiff whereby the Deliverance
 was made, but also destroy all right
 of Complaint for such Caption and
 Detention, and therefore goes in
 Bar of the Action, and consequent-
 ly gives a Return without Conusance
pro Retorno Habendo.

2 Lev. 92. If the Defendant confesses the
 1 Vent. 249 Caption, and pleads Property in
 Mod. Caf. 81. J. S. this is in Bar of the Action
 as well as in Abatement of the Writ,
 for this not only shews that the Plain-
 tiff had no Right to a Deliverance up-
 on the Writ, but also that he has no
 Cause

Cause to complain of the Caption and Detention against his Pledges, which is in Bar of the Action, as this is not only a Justification to cover the Defendant from Damages, but for the return of the Beasts; because he doth not admit Property in the Plaintiff, but disaffirms it, and therefore the Beasts ought to come back to the Defendant, because he ought to retain the Beasts against every one but *J. S.*

2. As to Justifications that affirm Property in the Plaintiff; and these cover the Defendant from Damages only, because the Plaintiff is entitled to his Beasts, as having Property in them; and the Defendant in such Pleas not making Title to the Beasts as a Pledge to answer any Demand, he ought not to have the Beasts back, but may cover himself from the Damages only for the Caption.

B b

Thus

Doct. Pla. 316 Thus if the Lord distrains for
 † Rol. Abr. Homage, and the Tenant dies, and
 319.
 † Danv. Abr. his Executors sue Replevin: Here
 652. the Defendant may justify and cover
 the Damages, because the Distress
 was rightly taken at first, tho' by the
 Death of his Tenant he can no longer
 retain as a Pledge for his Homage,
 and therefore cannot be entitled to a
 Return; because the Homage was
 a Service to be performed by the
 Tenant in Person, and the Distress
 being to compel him to it, cannot
 be detained longer than his Life, and
 therefore the Lord must distrain the
 Heir *de Novo*.

IV. Of *Avowries*, and the *Pleas* *thereunto.*

Having thus considered the Replevin and the Writ that issues upon proper Returns of the Sheriff, we come now to the Avowry.

The

The Avowry is the taking up the Defence of such Distress, and it acknowledges the Distress taken, but avoids the Injustice of the Caption complained of, and sets forth a good Cause for taking such Distress, in Order to have it returned again to the Defendant; so that in Replevin both Parties are Actors, the Plaintiff to have Damages for the taking and detaining his Goods, and the Avowant to have Return of the Plaintiff's Beasts and Damages,

Avowry's are either for Rents, Services, Herriots, &c. or for Damage Feasant, and here are to be considered,

I. What is Substance and what is Form.

B b 3

II. The

II. The several Pleas to the Avowries and herein of the several Traverses and Disclaimer.

1. *What is Substance, and what Form in Avowries.*

At Common Law the Lord was obliged to avow upon his real Tenant, which as the Antient Law stood was easily done, because the Tenant paid Fines on every Alienation, and the Alienee was presented by the next Homage; but when these small Fines for Alienation were not gathered, nor the Courts regularly kept, the Lords were at a loss to find their real Tenants, and consequently to know whom to avow upon. To remedy this the 21 Hen. 8. C. 19. S. 3. was made; by this the Lord may distrain on the Lands holden of him, and avow as in Lands within his Fee or Seignior, alledging in the

33 H. 8. Sess. 1.
c. 7 in Ireland.

the said Avowry the said Lands to be holden of him without naming any certain Person or Tenant,

Upon this Act it hath been held 9. Co. 22. a
Co. Lit. 268 b
Rast. Ent. 156b that tho' the Words are, that if the Lord distrain on the Lands holden of him, yet if the Lord come to distrain, and the Tenant drive the Beasts which were once in View of the Lord off the Land, or out of the Seignior, and the Lord pursues and distrains them out of his Fee, yet he may avow upon this Act; because the Distress in Construction of Law is taken upon the Land by Reason of the View and fresh Suit of the Lord.

In avowry the Defendant said that 1 Leon. 301
Cro Eliz. 146 *B.* was seised of the Lands where, Lucy
v.
Fisher. *C.* and held them of *A.* by Fealty and Rent, and for Rent arrear he made Conusance as Bailiff to *A.* in Land held of him, according to the Statute, and this was held a good Avowry

Avowry upon the Statute, tho' it was objected, that having once named the Tenant in his Avowry, the whole Avowry should have been at common Law; because the Statute was made to establish the Avowry without naming the Tenant at all, and therefore it ought much more to be good where he names him but once.

1. And. 159.
Broker.
v.
Smith.

If *A.* holds of *B.* by Rent, as of his Manor of *C.* and *A.* conveys to the King, and the King grants it over to *D.* *B.* cannot for his Rent avow, as on Land held of him, because by *A.*'s Grant to the King the Tenure is destroyed, tho' the Rent remains, because the King cannot hold of a Subject; and therefore *B.* must avow according to the Nature and particular Circumstances of his Case.

In

In Avowries on the Statute, the Lord alledges that the Lands or *Locus in quo* are held of him by such Services, and avows as on Lands within his Fee or Seigniory, without naming or avowing upon any certain Person or Tenant; this distinguishes it from the Avowry at Common Law, wherein the Tenant must be named; but in both Avowries the Lord alledges seisin of the Services.

Raft. Ent. 556
Brb. Avow.
pl. 4
Herns. Plead
727.
Co. Ent. 591
594-597, 598.

In the Avowry at Common Law, the Lord says *J. S.* his very Tenant is seised in Fee of the *Locus in quo*, and that he holds of him by Homage, Fealty and Rent, or such like, of which Service the Lord was seised by the Hands of the said *J. S.* and because the Rent, &c. was arrear, the Lord distrains and avows the taking and prays a Return; so that by this Avowry to make the Distress Lawful, the Lord must shew

shew a Seisin of the Rent by the Hands of some certain Tenant ; for the Lords possessory Right is mentioned in no other Manner than by shewing that the Tenant that was in the actual Possession of the Land did actually pay the Rent to the Lord, or to those under whom he derives ; for if so, the seisin of the Tenant of the Land, and of those claiming under him, continued for the Time of such Payment of the Rent to the Time of the Distress, is a seisin in Order to continue the Payment to the Lord, for out of the Yearly Profits he ought to have made the Payment demanded ; and therefore it is not like the Case of any real Action, where they lay the Seisin within the Time of Limitation, and that they were dispossessed ; for in such real Actions the Count supposes the Demandant is out of Possession of the Thing to be recovered ; but in the Avowry the Lord supposes his Seisin to continue
till

8 Co. 54 a
Co. Litt. 298 b

'till the very actual taking of this Distress, and therefore the Lord need not alledge his Seisin to be within forty Years according to the Statute of Limitation, when the Lord supposes himself still seised even at the very Day of the Avowry, and that this Distress is the very Collection of the Rent of which he is in Possession, and if he were not in Possession the Distress would be unlawful; for if the Lord had a Right to the Services, yet if he was not actually seised of them, he must be put to his Writ of Customs and Services, before he can continue the Seisin of the Services, in Order to recover them in this possessory Action.

When the Tenant comes in, if he do not disclaim, or plead *Hors de son Fee*, (of which hereafter) he must admit that he is seised of the Estate; but he may deny that he holds that Estate of the Lord by such Services,

C c

which

which is a Traverse of the Tenure, or he may traverse the Seisin of the Services by that particular Hand, by which the Lord in his Avowry alledges himself to be seised; because if that Seisin be destroyed, which is the Seisin from whence the Lord continues his own Possession to the Time of the new Caption, there is an Interruption of the Seisin of the Lord, and of his Title in this possessory Action; and therefore if that Seisin be found against the Lord, he cannot recover in Replevin, because he is out of Possession, but is driven to his Writ of Customs and Services in Order to recover the Seisin.

Doct. Pla. 317,
318. Bro.
avow. pl. 52.

If the Lord avows for Rent on a Gift in Tail, or Lease for Life or Years, there the Lord lays that he or the Person from whom he claims, was seised in Fee of the Land it self, and that he or such Person made such Demise or Gift, and by this Method

thod the Lord continues his Right to seise the Distress.

And here plainly the Lord continues his Seisin to the very Time of the Distress, because his Tenant was seised of the very Land it self, in Order to raise such Rent, and pay it to him by the original Stipulation, and therefore the Seisin of the Tenant was all along the Seisin of the Lord, and maintains his Possession in order to take Pledges for his Rent.

But if such Gift in Tail or Lease for Life or Years, were made before the Statute of Limitations, and there had been no Seisin continued, there the Statute of Limitations may be pleaded in Bar, because the Words and Intention of that Statute are to bar such antient Rights, where the Lord had not actual Seisin within the forty Years.

C c 2

If

8. Co. 65. If a Man makes a Grant of a
 Doct. Pla. 317 Rent Charge, there the seisin of
 318. Estate is laid in the Tenant of the
 1 Brown 169. Land, and it's the Deed that gives
 179. him Seisin of such Rent or the
 Power to get it; and there if the
 Tenant cannot deny the Deed, if
 the Commencement of it be within
 the Act of Limitation, the Grantee's
 Power of distraining, will there-
 by appear, and his Right to conti-
 nue the Possession under that Deed.

And if any other actual Seisin
 had been required by the Law in
 Cases of Leases, Gifts in Tail, or
 Rent Charges, the Lord would
 have no compulsory Means to ac-
 quire such Rent at first without the
 Tenant's voluntary Payment, which
 had been to elude such Leases, Gifts
 and Deeds; and therefore the Sta-
 tute of Limitations does not extend
 to such Leases, Gifts, or Deeds of
 Rent Charge, where the Law be-
 fore

fore the Statute required no Seisin at all necessary to be alledged in the Avowry; since as is said the Lord and Grantee continue the Possession of such Rents without actual Seisin, and the Statute hath not altered the Law in that Particular.

If *A.* be posselt of a Term of Years, rendering Rent, and distrains the Beasts of a Stranger for an Arrear of this Rent, it's not sufficient for *A.* in his Avowry, to say generally *quod Possessionatus fuit* of the *Locus in quo*; because *A.* having taken the Beasts of a Stranger, he must shew by what Title he took them, and this cannot be done without alledging a Seisin in Fee in his Lessor, in Order to shew a Right in himself to distrain.

If *A.* Lessee for Years lets for Years to *B.* by Deed indented, and distrains *B.* for Rent, 'tis sufficient for him in his Avowry to say *quod pos-*

3 Lev. 146. *Possessionatus fuit*, and leased to B. by Deed indented, for then B will be estopped to controvert A's Title to the Land during the Lease, tho' B. had taken a Lease of his own Land from A. but if the Lease were by Parol, then it seems he must alledge the Seisin in Fee; because taking the Property of another, and there being no Estoppel in the Case, whereby the Plaintiff in Replevin cannot controvert the Right of A. to the Land, it seems that A. must shew a Right or else he cannot maintain the taking of another's Property.*

If

* *The Irish Stat. of 9 Geo. 2. c. 13. Sect 4. reciting that the Remedy for recovering Arrears of Rent, by taking a Distress upon the Lands chargeable therewith, is tedious and difficult, by Reason of the Avowant being obliged in his Avowry to produce the Title to the Lands, from him who was seised in Fee, and to produce Deeds that no Way belong to him, enacts that, Where any Distress or Distresses shall be taken by any Landlord or Lessor for any Arrears of Rent then due, or that shall thereafter become due, upon any Lease for Lives*

If a Termor distrains the Beasts ^{2 Lutw. 1492}
of another *Damage Feasant*, and ^{Ball. v. Garlick}
the Owner of the Beasts brings his ^{1 Mod. 132}
Action of Trespass or Replevin, ^{C. 11th. 9.}
'tis not sufficient for the Termor in ^{2 Mod. 70}
his Justification or Avowry, to say ^{Contra.}
quod Possessionatus fuit generally ;
be- ^{Vide Fort. 256}
^{Salk. 643}
^{Lucas 37}

Lives or Years, or upon any Contract or Writing,
purporting a Demise of any Lands, &c. where
on any Rent has been paid by the Tenant, who
shall be in Possession of the Land at the Time
of such Distress taken, or by any Person under
whom such Tenant claims, where the Title to
the Lands is not in Question, and a Replevin
is taken or issued for such Distress, it shall and
may be lawful for any Avowant, in his Avowry,
to set forth only that he was seised or possessed,
without setting forth the Commencement of his
Estate, or deducing a Title from the Person under
whom he derives his Interest, or that such Person
was seised in Fee of the said Lands, &c. and that
the Want thereof, shall not be any Cause of De-
murrer to such Avowry ;

The Irish Stat. of taken from the English Stat.
of 11 Geo. 2. c. 19. s. 22. 25 Geo. 2. c. 13. Sect. 4.
Irish reciting that several Lands, Tenements, and
Hereditaments are enjoyed under Articles, Minutes
and Contracts in Writing, whereby the Rent paya-
ble for the same is ascertained, but the said Articles
Minutes or Contracts do not contain an actual De-
mise ; and that Avowry's or Conusances upon Dis-
treffes for Rent, could not be made, as the Law
then stood upon such Articles, Minutes or Contracts,
and that other Difficulty's often arise in making
Avowry's or Conusance upon Distresses for Rent,
not

because where the Termor takes the Beasts themselves for the Damages, he must set forth by what Right or Title he took them; for he cannot seise anothers Beasts for any Damages done to that which doth not appear to be his rightful Possession or Property; and therefore the Termor to justify this Caption in Trespass, or in his Avowry, where the Proprietor seeks a Restitution of his Beasts by Replevin, must alledge the Seisin in Fee in his Lessor, and so derive a Title to himself.

But.

not sufficiently remedied by the Laws heretofore made: enacts that, it shall be lawful to and for all Defendants in Replevin, to avow or make Confession generally, that the Plaintiff in Replevin, or other Tenant of the Lands, &c. whereon such Distress was made, enjoyed the same under a Grant or Demise, or Article, Minute or Contract in Writing at such a certain Rent, during the Time wherein the Rent so distrained for incurred, which Rent was then, and still remains due, without further setting forth the Grant, Tenure or Demise, or Title of such Landlord, Lessor or Owner of such Lands, &c. and it shall be no Objection to any such Article, minute or contract, that the same doth not contain an actual Demise.

But if the Avowant for *Damage* Raft. Ent. 561. b.
Feasant alledges the *Locus in quo* to Clifts. Ent.
be his *solum & Liberum Tenemen-* 564. Owen 51
tum, that is sufficient without alledg- Dyer 171. b.
ing the Seisin in Fee, for the Quan- Form. bene plac. 304
tity of the Estate is not material L. Raym. 333
where the Avowant Possesses *Jure*
proprio, for he hath shewn enough
to entitle him to the Caption, if
the *Locus in quo* be his *Liberum Te-*
nementum; but the Lessee that pos-
sesses *Nomine alieno* hath no more
than a precarious Possession, which
is either good or bad according to
the Estate of him in whose Right
he possesses; and therefore if he
doth not shew an Estate to entitle
himself to the Caption, he doth not
shew any Right to take them at all,
for it covers the Right only to shew
a Term, and not a Freehold out
of which it's derived; it's only the
Freeholder, or his Bailiff, or Person
deriving under him, that hath Au-
thority to take another Man's Beasts
D d upon

upon the Soil, for a Stranger that is no Bailiff of the Freeholder is a Trespasser if he doeth it, and therefore if a Person doth not shew in his Avowry that he doth it in his own Right, or by whose Right he doth, he shews no Right at all to take such Distress.

But if the Termor instead of taking the Beasts into his own Hands for a Compensation of Damages, shall recur to the Law to have a-mends by Action of Trespass *quare Clausum fregit*, since here he comes to the Law only for a Compensation for the Damages done to his Possession, he hath nothing to do but to shew his Possession, unless the Defendant shew a Right to the Land it self.

Cliff. 642

Hob. 28

Bro. Avow. 38
2647

If the Grantee of a Rent Charge avows for his Rent, he must also alledge a Seisin in Fee-simple in his Grantor, of the Lands out of which

which the Rent issues ; for this being a Rent not arising from any Tenure, doth not turn on the Rule that governs the feudal Services ; but the Reason is, that the Avowry being in the Nature of a Declaration, the Avowant, as all other Plaintiffs in other Actions, ought to shew to the Court, that what he sues for is subsisting, and this he doth not do unless he alledges a Seisin in Fee in the Grantor ; for if the Rent-Charge was granted in Fee by a Person who is only Tenant for Life, the Grant determines by his Death ; and therefore the Grantee ought to shew to the Court, that his Grant has still a Continuance, which is best done by alledging a Seisin in Fee in the Grantor, and this Seisin in Fee in the Grantor is traversable.

If Tenant in Fee, Leases for salk. 562. Years rendering Rent, and brings an Action of Debt for the Arrear of Rent, he need not alledge any Sei-

fin in Fee in his Declaration, because the Action of Debt arises from the Contract of the Parties, and was not substituted by the feudal Law in the Place of Forfeiture; and therefore in Debt for Rent, the Lessor only declares *quod cum demisit* such Lands to *A.* for such a Term, rendring such certain Rents, by Virtue of which Demise *A.* entered, &c.

Clift. 225

But where in Debt for Rent, the Plaintiff sues as Assignee of the Reversion and Rent, it seems by the Precedent that he must alledge a Seisin in Fee in the Lessor; because since the Plaintiff did not demise himself, he must shew who did, and that the Reversion came by such Assignment to him; in Order to make his Title to the Action, for it seems absurd that the Plaintiff should say that the first Lessor granted the Reversion to him; without first shewing that he

ration,

had it in himself; and hence it should seem to be necessary even in Debt for Rent, to alledge in this Case a Seisin in Fee in the first Lessor, for he doth not come in as a Representative of the Contractor, but as Assignee of the Reversion; and therefore must shew the particular Estate of the Reversion.

In Avowries there must be always a Place certain mentioned Sider. 10, 20. Hob. 16. where the Caption was, for the Avowant must admit the Caption to be in the Place mentioned in the Declaration, in order to shew the Cause of taking it there; for if the Avowant should lay the taking in another Place than the Plaintiff hath done without traversing the Place mentioned in the Declaration, this would be altogether bad; because the Avowant neither confesses and avoids nor traverses the Declaration, and therefore such Plea is Nugatory and not to the Purpose.

Where

Danv. 653

Cro. Ja. 372

Wheadon v.

Sugg.

Where a Man avows in his own Right, the Form is *quod bene advocat Captionem et Juste*, &c. where he makes Conufance in right of another, he fays *bene Cognovit Captionem*, &c. but tho' this be the regular Form, yet it hath been held upon Demurrer, that where the Defendant avowed in his own Right by *bene Cognovit Captionem*, &c. it was well enough; becaufe the Avowry is a Confeflion of the Caption, which both the Words *Advocat* and *Cognovit* do confefs, and avoids the Injuftice of fuch Caption for the Reafons mentioned in the Avowry.

Dalifon

Cro. Ja.

72

283

If the Defendant avows for Rent being in Arrear at *Michaelmas*, & *Tempore Captionis*, this is good, tho' he doth not fay, *quod adhuc aretre Exiftit*; for the Avowant avoids the Injuftice of the Caption, if he fhews that the Rent was in

in Arrear at the Time he took the Beasts, nor is he obliged to say *quod adbuc Aretro existit*, to excuse himself from an unlawful Detention, because after the Beasts are once impounded no subsequent Tender or Payment can make the Detention unlawful in this Action.

In an Avowry by Husband and Wife in Right of his Wife, for Arrears of a Rent-Charge incurred before the Coverture, the Avowry concludes, and because at Michaelmas, &c. 20 l. was in Arrear and not paid to the Husband and Wife, he distrained and avows, &c. and it was objected, that by his own shewing the Arrears were not due to himself and his Wife, and therefore the Avowry ill; but the Objection was over-ruled, because if he had said, for 20 l. Arrear he distrained, that had been good, and the rest was held Surplusage.

If

Cro. Ja. 289
Bowles v.
Poor
Bullst. 139.
S. C.

Hob. 208

If one avows as Administrator for Arrears of a Rent-Charge, where he may claim the Arrears in his own Right, and it appears that the Avowry is not so framed as to entitle him to the Arrears as Administrator, yet the Avowry is good, because where there are two Titles set forth in the Avowry and only one sufficiently alledged, that one Title only gives him as good a Right to the Rent as both, and therefore he ought to recover, and the Avowry as Administrator shall be surplusage; as if a Rent-Charge be granted to the Husband and Wife during the Life of the Wife, and the Husband dies and the Wife avows as Administratrix to her Husband where she might avow *Jure Proprio*, yet she having a Title to it in her own right by the Grant, the Avowry is good.

If

If a Man avows for an entire Rent, where it appears that he hath Title only to a Moiety of it, the Avowant cannot recover; because he hath not avowed according to the Circumstances of his Case, and therefore cannot make out his Title as he hath laid it. For suppose *A.* and *B.* were joyntenants of a Rent, and *A.* distrains and avows for the Whole, this Avowry is bad; for if it should stand, and *A.* should recover his Moiety, then there must be two Suits for one joint Demand, which would be vexatious and absurd; and in this Case the Avowry and Action of Debt stand on the same Reason and agree.

Saud. 282.

284.

Duppa. y.

Mayo. Cr.

Cr. El. 340.

637, 651.

Yelv. 23.

Cr. Car. 154

Rast. ent. 565 a

1 Ro Abr. 320

2 Lutw. 1211

Carth. 328.

So likewise Coparceners must join in Avowry; therefore if one Jointenant or Coparcener distrains alone, he must avow in his own Right and as Bailiff to the other.

Salk. 390.

Carth. 364.

E c

If

Cro. Car. 104, 137. If in the Avowry the Lessor
 Cro. Jac. 498. avows for only Part of an half
 4 Mod. 402. Years Rent that is due, and doth
 not shew that the Residue is satis-
 fied, such Avowry is ill; because
 where a certain Rent is due it must
 be demanded at once; for if Part
 only should be demanded, and the
 Residue not appear by the Avowry
 to be satisfied, and the Avowant
 should recover that Part which he
 demands, he may then multiply
 Suits by suing for Part of his Rent
 at one Time and Part at another,
 which is against Reason and the
 End and Policy of the Law; and
 in this also the Avowry and Action
 of Debt for Rent agree.

Cro. Eliz. 547. If Executors avow on the 31 H.
 Miles. 8. C. 37. for the Arrears of a
 Willoughby. Rent in Fee granted to the Testator,
 they must shew that the Lands lya-
 ble to the Rent-charge continue in
 the Hands of the Tenant or Pur-
 chafer

chafer in whose Time the Rent sued for incurred, because this Remedy being given by the Statute, the Method prescribed by the Statute must be observed.

In an Avowry for a Heriot, the ² Mod. 4. 5. Avowant as Bailiff to *J. S. bene Cognovit Captionem Averiorum prædictorum in prædicto Loco*, without saying *Tempore quo*, &c. and yet held good; because the acknowledging the Caption as set forth in the Declaration admits it to be at the Time laid there.

If two Tenants in Common distrain for Rent, they must make several Avowries, because they claim ^{Lit. Sect. 317} the Rent and Reversion by different ^{Co. Lit. 198. b} Titles, and therefore must severally ^{Cr. El. 539.} set them forth in distinct Avowries.

E e 3

If

5Co.19 a.386 If two Persons distrain an Ox, or an Horse, and are obliged to make different Avowries, both Avowries must abate; because if both should shew Cause to have Return, the Court could not give Judgment for both, and therefore neither can have it.

Hutton 4.
Cr. Car. 260.
Hob. 176.

In an Avowry for Heriots, you cannot avow for a Heriot generally, but you must avow for the best Beast or the two best Beasts of the Tenant, as the Case is, for otherwise the Plaintiff would be ousted of his Replication that the Tenants left no Beasts.

II. *Of the several Pleas to Avowries.*

Tho' the Avowant may now by the Statute avow as in Lands holden of him and within his Fee and Seignior; yet it's provided by the said Act

Act that the Plaintiff's and Defendants in Writs of Replevin and second Deliverance shall have like Pleas and like aid Prayers in all such Avowries, Conusances and Justifications, as they might have had before, and as tho' the said Avowry Conusance or Justification had been made after the due Order of the Common Law, (Pleas of Disclaimer only excepted.) For this Reason and because the Lord is still left to his Avowry according to the Common Law, it will be necessary to consider the several Answers and Pleas that at Common Law might have been made to the Avowry, and herein,

1. Of the Disclaimer.
2. Of the Plea *Hors de son Fee*.
3. In what Cases the Tenure was traversable.
4. In

4. In what Cases the Seisin of the Services was traverfable.

1. Of the Disclaimer.

Raft. Ent. 224,
225.
Doct. pla. 133.
Co. Lit. 102. a.
268. b.
 And here it's to be observed, that at Common Law the Avowry was always upon some certain Person, and if such Person claimed or pretended no Right to the Tenancy he might have disclaimed. By such Disclaimer he denyed to hold the Tenancy of the Land at all; 'twas a Renunciation of his Homage and Fealty, and that he would not hold of the Lord upon any Terms; and therefore the Lord on such Disclaimer was intitled to the Restitution of the Land-it self, which was originally given for the Services avowed for, and in order to bring back the Land it self, the Lord had a Writ of Right setting forth the Proceedings in the Replevin and such Disclaimer; and hence we may see the Reason why

why there could be no disclaimer to any Avowry on the Statute of H. 8. because the Avowry on the Act is not on any Person certain, but on Lands, within the Lords Fee and Seignior, and therefore whoever takes up the Defence to such Avowry must be only a Person concerned in the Tenancy, because if an entire Stranger should take up the Defence and be allowed to disclaim, the Lord could not have return of his Distress, but must take his Writ of Right for the Lands themselves; and in the Prosecution of that Writ he could not prevail, because the rightful Tenant would appear to bar him, and so the Lord be disappointed both Ways.

But a Disclaimer cannot be where Doct. pla.
a Man levies a Fine of a Seignior, 31, 32.
and the Conusee brings a *per quæ Ser-*
vitia to have the Attornment of the
Tenant; because the Lord will not
be entitled to the Services, or to
the

the Land it self in Case of a Disclaimer, until he hath Possession of such Services by Attornment; and therefore the Tenant in the *quæ Servitia* shall not disclaim, because the Lord upon such Disclaimer cannot have a Right to the Land it self; but when ever the Lord is in Possession of the Seigniory and pursues his Right for the Services by Replevin, *Cessavit*, or the like, there the Tenant may disclaim, because the Lord on such Disclaimer shall have the Land it self, which was originally given for such Services.

Doct. pla. 132. But here it is to be noted, that the Tenant must be a Person capable of the Act of Disclaimer; because if he be an Infant, such Disclaimer shall not turn to his Prejudice by Reason of his Indiscretion.

Doct. pla. 131, 132. So where the Tenant is seised of the Lands in right of another, in order

order to preserve such Right; and therefore the Disclaimer of the Abbot shall not hurt the Church, nor of the Husband the Wife, because they are intrusted by Law to defend the Right of the Tenancy and not to destroy it.

If there be a Lord, Mesne and Tenant, and the Mesne disclaim the Right of the Mesnalty, the Mesnalty is extinct, and the Tenant holds of the superior Lord as the Mesne held over; for here by such Disclaimer the Lord cannot have Possession of the Land, because the Tenants Interest therein by the Disclaimer of another cannot be hurt; but the Lord comes nearer the Tenancy by such Disclaimer, because if the Tenant dies without Heirs, the Escheat of the Lands is immediately to the Lord and not to the Mesne.

Doct. pla. 133.

F f

In

Doct. pla. 133. In a *Formedon*, which the Statute *de Donis* hath given to recover the Lands and not Damages, if the Tenant disclaim, the Demandant shall recover the Land it self immediately; but in an Affise and Writ of Entry, where the Demandant seeks Damages as well as the Land, 'tis not enough for the Tenant to disclaim; because then every Disseisor, when the Action is brought against him would disclaim, in order to screen himself from Damages; but the Demandant, notwithstanding such Disclaimer, may aver that he was Tenant of the Land in order to have his Damages.

Doct. pla. 133. If a *Præcipe* be brought against two, and one disclaim, the whole Frank-tenement vests in the other; but if one pleads Non-tenure, the whole does not vest in the other; because tho' the other be not seised of them, yet a Right may remain in

in him, and his Pleading that he doth not hold the Lands, doth not vest the Right in another,

If one disclaims and the other Doct. pla. 134. pleads Non-tenure, the Demandant may enter into the Whole; because by the Disclaimer of one, the Tenancy shall not vest in the other that hath no Seisin, against his own Plea of Non-tenure, and therefore the Demandants Right of Entry is open to him,

If a Præcipe be brought against Doct. pla. 134. two, and one makes Default after Default, and the other disclaims, the Demandant shall recover the Whole, because the Default bars one and the Disclaimer the other.

2. Of the Plea of Hors de son Fee,

As the Tenant may disclaim so Raft. Ent. 566. he may plead *extra Feodum*, and b. Vide the such Plea doth not amount to a Dis Form of the Plea.
 F f 2 claimer,

claimer, for if they should construe the Plea of *extra Feodum* to amount to a Disclaimer in all Cases, then those Tenants that were Boundaries of Mannors would be exceedingly harrassed by the Neighbouring Lords, and therefore as the Tenant might disclaim, which is an entire Renunciation to hold of the Lord, and whereby the Tenant disclaims to pay those Services as the Price of the Land it self, so he may plead *Hors de son Fee*, which is taking upon him the State of the Land, and acknowledging to hold by such Services if he be within the Seigniory of the Lord; for in this Plea he doth not renounce the Services (for that is the Plea of Disclaimer); but he takes up the Land under the Services the Lord demands of him, and owns them as the Price of the Land in Case the Lord be entitled to such Services; and therefore the Tenant may Plead *extra Feodum* as well as disclaim in Replevin, because

because he may shew that he is willing to hold by such Services in Case the Lord be entitled thereunto.

If the Lord brings a Writ of ^{Doct. pla. 216.} *Mortdancestor* for his Services, the Tenant cannot plead *Hors de son Fee*; because there the Lord makes Title in his Writ, and the Tenant must answer to the Title set out in the Writ, and therefore he cannot plead generally out of his Fee, for that doth not answer the Title in the Writ; but he must plead that the Plaintiff's Ancestor did not die seised, which goes to the Title in the Writ.

If the Lord in Replevin do not avow upon his very Tenant but ^{Doct. pla. 216, 217.} upon a Stranger, such Stranger when ^{2 Co. 20. b} he comes in, may plead that he himself is *extra Feodum*; for having never held of the Lord, the Lord cannot maintain his Avowry, for the Lord cannot say that he held of him,

him, if the Tenant never was in his Homage; this Plea of *Hors de son Fee* is the only Plea that a mere Stranger to the Avowry, yet made Party by *aid Prayer*, may plead in Abatement of the Avowry.

Co. Lit. 268. But to explain this Matter fully, we must consider the antient Avowry of the Lord upon Disseisins committed; and on such Disseisin the Disseisor did not become Tenant to the Lord (not even if the Lord had accepted Rent of him) so as to prevent the Disseisee from compelling the Lord to avow on him, tho' by such Acceptance of Rent the Disseisor was stopp'd to say he was not his Tenant, and the Lord *quoad* him was also estopp'd from saying that he was not his Lord; so that if the Disseisee died without Heirs, the Lord could not enter into the Tenancy, having already by his own Acceptance of the Rent admitted the Land to be full of another; but be-

between the Lord and Disseisee there was no estoppel at all, because the Disseisin being a tortious Act, if the Lord did collude with such Disseisor, that should be no Prejudice to the Disseisee; and it was often usual on such Disseisins for the Lord to obtain more Rents from such Disseisors, and when the Disseisee came to take Possession and put in his Beast, the Lord would distrain the Beasts of the Disseisee, and avow on the Disseisor for the Rents that he had accepted from him; now on such Avowry of the Lord it was a dangerous Plea for the Disseisee, to say that the Disseisor was out of the Fee of the Lord, because the Acceptance of such Rents and Services from the Disseisor brought him within the Lords Fee; and therefore the Disseisee was compelled to shew the Special Matter, that he was very Tenant to the Lord, ^{9 Co. 21. a} that he had paid the Services (or tendered them) that were due, and that

that the Lord ought to avow on him, which was in Abatement of the Lords Avowry, because it destroyed that Avowry upon his Beasts for the Services which the Lord had accepted from the Disseisor, and compelled the Lord to avow the Caption of his Beasts for the Tenure that was really due from the Disseeisee to the Lord; but as an Inducement to this he was Obligated to shew that the Rent was tendered or not in Arrear, that the Injury might appear on the Lords Side, and that he did not accept of another for want of Payment from him; and as the Disseeisee might have Entered himself and put in his Beasts, so he might have let to another who might likewise put in his Beasts, and then if the Lord had avowed upon the Disseisor, such Lessee might have shewn that there was a very Tenant, the Disseeisee who had paid or tendred the Rent to the Lord, and had made a Lease to him
who

who put in his Beasts which were distrained; for the Lessee, who kept Possession for the Disseisee, had the same Privilege that the Disseisee himself had to plead this Special Matter, because he shou'd not be lyable to the Services unjustly accepted from such Disseisor, and he had a right to *pray in aid* of such Disseisee, that the Disseisee who had the Title Deeds of the Land might be brought in to make out his Right, or if he fail, that the Lessee might have the Writ de *Plegiis acquietandis* against such Lessor.

So it is if the very Tenant in 9 Co. 20. Possession made a Lease to A for Years, and the Lord had distrained A, and avowed upon a mere Stranger, A might upon Special matter have *prayed in aid* of the Lessor, and by that means have brought him in to defend the Tenancy from the Distress of the Lord, by compelling the Lord to avow upon the

G g Lessor;

Lessor; for A being only a Termor cannot plead the Payment of the Rent and Services without his Lessor who is the very Tenant, and when the Lessor is brought in, if the Services are really done, that abates the Lords Avowry; if they are not performed, the Lord shall have Return of his Pledges, but then A hath Remedy over against his Lessor by Writ de Plegiis Acquietandis.

Co.Lit.268.a. But if the Disseisor had died seised, and the Lord had accepted Rent from the Heir of the Disseisor who came in by Title, the Lord was obliged to avow on such Heir, and the Entry of the Disseisee or the Right of putting in his Beasts or demising to his Tenants was taken away, and then the Disseisee was not very Tenant, nor could he compel the Lord to avow upon him 'til he recovered his Right in the real Action. My Lord Coke says the Feoffee of the Disseisor is in the same

same Condition with the Heir : But
Qy. of this unless it be in antient
 Times, when a Feoffment was
 construed to toll an Entry as well
 as a Descent.

When the Lord avows upon a
 Stranger, and takes the Beasts of a
 Stranger, who is neither very Ten-
 nant nor Lessee of the very Tenant,
 such Stranger can plead nothing but
Hors de son Fee, because he hath
 nothing to do with the Right of
 Rent, since the Avowry is not on
 the very Tenant ; but such Stranger
 may disengage himself by the Plea
 of *Hors de son Fee*, because the
 Lord hath not shewn just Cause of
 Caption of such Beasts, if he hath
 not maintained his Avowry by prov-
 ing such Services are due from the
 Person he avowed on.

Lessor; for A being only a Termor cannot plead the Payment of the Rent and Services without his Lessor who is the very Tenant, and when the Lessor is brought in, if the Services are really done, that abates the Lords Avowry; if they are not performed, the Lord shall have Return of his Pledges, but then A. hath Remedy over against his Lessor by Writ *de Plegiis Acquietandis*.

On Disseisin. But if the Disseisor had died seised, and the Lord had accepted Rent from the Heir of the Disseisor who came in by Title, the Lord was obliged to avow on such Heir, and the Entry of the Disseisee or the Right of putting in his Beasts or demising to his Tenants was taken away, and then the Disseisee was not very Tenant, nor could he compel the Lord to avow upon him 'til he recovered his Right in the real Action. My Lord C. says the Feoffee of the Disseisor is the same

same Condition with the Heir : But
Q^y. of this unless it be in answer
Times, when a Froffment was
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as a Deforc.

When the Lord avows upon a
Stranger, and takes the Heir of a
Stranger, who is neither very Ten-
nant nor Lessee of the very Tenant,
such Stranger can plead nothing but
Hors de son Fee, because it has
nothing to do with the King's
Rent, since the Avowry is not
the very Tenant ; but such Stranger
may disengage himself by the
of *Hors de son Fee*, because
Lord hath not shewn just Cause
Caption of such Heir. If the
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3. *When the Tenure is traversable,*

9. Co. 33-359
 Bucknall's Case
 Cro. El. 799.

And this is when the Tenant doth not entirely withdraw himself out of the Homage of the Lord, but doth not admit the same Sort of Services as the Lord hath avowed for; as if the Lord avows for Fealty, Rent, and Suit of Court, and alledges Seisin of all, if the Services were really but Fealty and Rent, the Tenant in such Case may traverse the Tenure, that is he may admit that he holds by Fealty and Rent, and as to the Rent that there is nothing in arrear, and traverse the Tenure with an *absque hoc* that the Tenancy was held by Fealty, Rent and Suit of Court, *modo et forma prædicto* &c. and in this Case tho' the Avowry had been only for Rent arrear, yet if the Tenure thus traversed be found against the Lord, he shall not have Return, because the Point in Issue is found against him;

him ; the Reason is because the Tenure is the Lords Title, and the Lord must set forth his Title as it really is, and therefore if it be by Knights Service he must set forth by Knights Service, if it be by Fealty only, he must set it forth so ; if it be by Fealty and Rent, he must set forth in that Manner ; and if the Lord fails in making out the Title he hath set forth, there's an End of the Lords Avowry, because he doth not prove the Title he hath alledged ; but if the Lord sets out a Title by 10 s. Rent, the Tenant cannot say that he holds by 5 s. *absq. hoc* that he holds by 10 s. because the Tenant holds by Rent Service, whether more or less, and the *Quantum* of the Rent do not alter the Nature of the Service, whether it be less or more ; and after the Statute of *quia Emptores* the Services were subdivided, but the Tenure remained the same, and therefore it would have been a dangerous Thing

Thing after the Statute, when the Services were subdivided and apportioned by the Alienation of the Tenant, to have suffered the Tenant to have traversed the Quantity of the Services which were more or less according to his Share of the Land ; but they allowed him to traverse the Seisin as is said hereafter, because the Lord could not recover more of him in Replevin than the Services of which he was seised.

9 Co. 35. a
Doct. pla. 318. But the whole Tenure is not traversable; as in the aforesaid Case, the Tenant cannot plead that he holds the Tenancy of a Stranger by such Services, *ab/q. hoc* that he holds them of the Avowant, because by such Plea the Tenant withdraws himself entirely from the Homage of the Lord, and where he does that, his proper Plea is a *Disclamer* or *Hors de son Fee*.

IV.

4. *Where the Seisin is traversable.*

And this is where the Tenant doth, Co. 33. not only take the Estate of the Land upon him, but admits also the Tenure by the same Sort of Services, and disagrees with the Lord only in the Quantity, as if the Lord avows for 10s. Rent, where the original Reservation was only of 5s. and the Lord had obtained the Seisin of the 10s. by Coertion of Distress, the Tenant may traverse such Seisin and thereby avoid such Encroachment in the Avowry; for the Tenant in this Case cannot plead *Hors de son Fee*, because he is plainly within the Homage of the Lord, nor can he traverse the Tenure, because that is by the same Sort of Services as are avowed for; but he may traverse such Seisin of such encroached Services; because what the Lord hath obtained by Coertion and Force, can be no Foundation to

to ground a Right upon; But if such Seisin of the 10s. Rent had been obtained by the voluntary Payment of the Tenant, he cannot traverse such Seisin, nor avoid the Payment of such Ineroach'd Rent in the Action of Replevin, for the Tenant cannot traverse the Tenure for the former Reason, nor the Seisin because that issue must be against him, in regard the Case supposes the Lord to be actually Seised by his voluntary Payment, and therefore where the single issue is whether the Lord is seised or not it must be against the Tenant in his possessory Action.

But the Tenant may avoid such Enchroach'd Rent by *ne Injuste vexes*, because that is a Writ of Right where the mere Right to such Services may be controverted, and consequently the bare Seisin of the Services will not avail the Lord, unless they were originally reserved; for
when

when the bare Right to the Rent is in Question, there can be no Reason to compell the Tenant to pay that for ever, which he once paid tho' voluntarily in his own Wrong; so it is in a *Cessavit* brought by the Lord, because the mere Right to the Services is controverted in it.

If the Tenant instead of suing a ^{9 Co. 34. a} Replevin for the Distress taken by ^{Doe. pla. 318.} the Lord for those encroached Services, brings an Action of Trespas against the Lord, there the Seisin shall not conclude the Tenant; so in an *Affise* or Writ of *Rescuous* brought by the Lord, because if the Lord hath really no Right to the encroached Services, the Lord is punishable as a Trespasser for taking the Tenants Beasts, and when there is no just Cause of Caption the Tenant may rescue; and if the Lord bring a Writ of *Rescuous*, the mere Right to the Services will come in Question; and if that appear

H h against

against the Lord, the Tenant hath a Right to rescue the Beasts distrained.

9 Co. 34. a. But even the Traverse of the Seisin in the Avowry is to be understood with these Restrictions:

Doct. pla. 318. For 1. The Issue in Tail may traverse the Seisin of Services of the same Nature, tho' the Lord had obtained such Seisin by the voluntary Payment of the Donee in Tail; because the Donee during the Continuance of the Entail cannot charge or incumber the Lands entailed so as to bind or affect the Issue; and for the same Reason the Successor of a Bishop or Prior shall traverse the Seisin of the encroached Rent given by the voluntary Payment of their Predecessors.

9 Co. 34. a. 2. So the very Tenant shall traverse such Seisin if he hath a Deed to shew by which the Services were reserved, for the Deed destroys that

that Title which the Seisin of the Services gave the Lord, if these Services appear not to have originally been reserved.

3. The Seisin of Services by In-9 Co. 34. b. croachment is not material where there is no Tenure, because where there is no Tenure the Tenant may plead *Hors de son Fee*, and so discharge himself from all Services.

4. If the seisin was not within the 9 Co. 34. b. Stat. of Limitations, the Tenant may plead the Statute to defeat the Seisin of the Lord before the Statute of Limitation, for this is a Statute bar to quiet Mens Possessions against stale Demands; but the Tenant in such Plea must acknowledge the Tenure to give the Lord a Writ of Customs and Services, which being an Action of an higher Nature hath longer Time of Limitation allowed to it than a Possessory Action.

H h 2

5.

Doct. pla. 132.
9 Co. 34. b.

5. In Avowries the Tenant shall not plead *ne unq. Seifse de Services* generally. because this amounts to a Traverse of the Tenure, since if a Man had never been seised of an immemorial Service he can have no Right to it, and in such a Case the Tenure ought to have been Traversed, which stands confessed in this Plea, since he hath not traversed *quod non Tenuit*.

9 Co. 35. a.

6. The Seisin is not traversable but only of Services for which the Avowry is made, except a Seisin be alledged of Services of a higher Nature, which include those in the Avowry; as if the Tenure be by Homage, Fealty, Rent and a Pound of Pepper, and the Lord alledges a Seisin of all, and avows only for the Pound of Pepper, the Tenant cannot traverse the Seisin of the Rent, because it is not material whether the Lord was seised of the Rent or not

not to make out his Demand for the Pound of Pepper; but if the Tenure be by Homage, Escuage and Rent, and he alledges Seisin of all, and avows for Homage which is included in Escuage, there by traversing the Seisin of the Escuage you traverse the Seisin of the Homage, which the Lord demands in his Avowry.

IV. *Of the Judgment in Replevin.*

'Tis already observed that on the Co. Ent. 573. b Execution of the Writ of Replevin by the Sheriff, the Beasts distrained are actually returned to the Plaintiff, so that he hath the Possession and Use of the Cattle pending the Suit, and consequently if the Plaintiff in Replevin hath Judgment, it can only be for Damages; and therefore the Entry is, *quod* the Plaintiff, *recuperet versus* the Defendant, *Damna sua occasione præmissa, sed quia nescitur quæ Damna*

ad. Book of
Judg. 203.

Damna præd. (the Plaintiff) *sustinet* *occasione præmissa*, a Writ of Enquiry is awarded to enquire *quæ Damna præd.* (the Plaintiff) *sustinet tam occasione præmissa, quam pro Misis & Custagiis suis, per ipsum circa sectam suam in hac parte appositis.* And on the Return of this Inquisition, the Plaintiff hath final Judgment, *quod recuperet verus præfatum* (the Defendant)

v Carth. 362.
5. Mod. 118.
1 Salk. 205.
Co. Ent. 575. a

Damna sua præd. ad per Inquisitionem præd. in forma præd. comperta, nec non eidem (the Plaintiff) ad requisitionem suam pro Misis & Custagiis suis præd. per Curiam hic de incremento adjudicata, quæ quidem Damna in toto se attingunt ad et præd. (the Defendant) in Misericordia.

This Writ of Enquiry must be understood to issue where the Plaintiff hath Judgment on a Demurrer, &c. and not on a Verdict; but if there be a Verdict for the Plaintiff, the

the Jury on that Verdict ascertainment the Damages, that the Plaintiff hath sustained by the unjust Caption and Detention; and also the Costs of Suit, and then there is no Occasion for a Writ of Enquiry; but the Judgment is, *quod* the Plaintiff *Recuperet versus* the Defendant, *Damna prædicta per Juratores prædictos in formâ prædictâ assessa, nec non pro Misfis, &c. de Incremento adjudicata, &c.* & the Defendant *in Misericordiâ*.

On the other Hand if the Judgment be for the Avowant on De-
murrer, then the Entry is, *quod* the Plaintiff *nil capiat per breve suum præd. sed sit in Misericordiâ pro falso Clamore suo, & præd.* (the Defendant) *eat inde sine die, &c. & habeat retorum Averiorum præd. detinend' sibi irrepleg' in perpetuum; & qualiter, &c. Vic. constare faciant hic, &c. & quod præd.* (the Defendant) *Damna sua occasione præ-*

Co. Ent. 572 B
2 Book Judg
205.

21 H.8.C.19. *premissi recuperare debeat. sed quia nescitur, &c.*

2 Book of
Judg 206.

But if there be a Verdict for the Avowant, the Jury in that Verdict ascertains the Damages, and then there needs no Writ of Enquiry; but the Judgment is entered, *quod* (the Defendant) *habeat retorum anteriorum prædictorum, &c. Consideratum est etiam quod præd.* (the Defendant) *recuperet versus præf.* (the Plaintiff) *Damna sua præa. &c. per Juratores præd. in formâ præd. assessa, nec non* *eidem* (the Defendant) *ad requisitionem suam pro Missis et Custagiis, &c.*

2 Book of
Judg 206.

So that wherever the Judgment is given on a Verdict either for Plaintiff or Defendant, that Verdict ascertaining the Damages, there needs no Writ of Enquiry to issue; but where the Judgment is not founded on a Verdict but on a Demurrer, or *Non-prof.* of the Plaintiff,

tiff, &c. there the Damages must be ascertained by a Jury on a Writ of Enquiry, because what Damages either Party hath sustained is a Matter of fact, and therefore to be settled by a Jury. But if both Parties consent that the Court shall settle the Damages without a Jury, then the Entry is *super quæ Justic. hic ad petitionem ipsius* (the Defendant) *ex assensu præd.* (the Plaintiff) *affident Damna ipsius* (the Defendant) *occasione præmissa, &c. ultra Missas, &c.* and this Judgment is good *quia Consensus tollit Errorem.*

As to the Retorno Habendo.

In all Cases where the Defendant in Replevin avows and hath Judgment, on such Avowry he shall have return of the Beasts awarded, because the Avowry allows the Caption, but avoids the Injustice thereof, by shewing he had good Cause of taking such Distress, and conse-

I i quently

quently if such Cause of Caption be approved of by the Court, they must in Justice return the Pledge to the Avowant.

And where the Defendant instead of an Avowry pleads to the Writ of Replevin, that is where he does not admit the Caption and avoid the Injustice of it, but by Plea insists that the Plaintiff ought not to have the Writ of Replevin, whether he the Defendant took them or not, yet here the Defendant in some Cases shall have Return without any Avowry or Conusance made; and in Order to settle this it will be necessary to take up a Distinction already observed between Pleas that disaffirm Property in the Plaintiff, and Pleas that admit the Property in the Plaintiff; as if the Defendant in the Replevin pleads Property in the Beasts in himself or in a Stranger, whether it be
pleaded.

pleaded in Abatement of the Writ, Bro. Retor. de
avers pl. 28.
1 Vent 249
in Bar of the Action or in Justification, if the Defendant prevails in it he shall have return without any Avowry; because if these Pleas be true they destroy all Right of Complaint in the Plaintiff for the Caption and Retention, and consequently if the Plaintiff hath no Right to the Writ of Replevin under the present Form nor under any other, he ought to have no Benefit from his unjust Complaint, and therefore the Court must award Restitution of the Beasts to the Defendant, out of whose Possession they were taken by the Replevin.

But if the Defendant pleads Property in the Plaintiff, and *J. S.* tho' this Plea abates the Writ under the present Form, yet by admitting the Property in the Plaintiff, it shews that the Plaintiff and *J. S.* have a Right to a Replevin under another Form, and consequently the De-
I i 2 fendant

fendant shall not have Return of the Plaintiff's Beasts unless he shews good Cause for such Return, and avoids the Injustice of the first Caption complained of by the Plaintiff,

Bro. Ret. des
avers. pl. 28
Rast. Ent. 554

So if the Plaintiff in Replevin lays the Caption in *D.* and the Defendant pleads that he took them in *S. absque hoc* that he took them in *D.* this Plea if found for the Defendant, may excuse him from Damages, but can never give him a Return of the Beasts without a Conusance or an Avowry, because he leaves the Plaintiff a Right to retain his Beasts, when he neither denies the Property to be in the Plaintiff, nor shews any Cause why he should take them as a Pledge.

If the Tenant offers his Rent at the Time of the Distress taken or before impounding, and the Lord refuses to accept it, he shall never after

after have Return of the Beasts, tho' the Rent be arrear, because the Distress is but a Pledge for the Rent, and when the Rent is offered, the Pledge ought to be restored, and consequently the Court will never award the Return of the Pledge to the Lord, which he ought to have restored to the Plaintiff before the Replevin was taken out.

If the Plaintiff be Non-suit before he declares, the Defendant shall have Return of the Beasts without making any Conusance or Avowry; because where there is no Express Charge made against the Defendant by a Declaration in Court, the Defendant hath not an Opportunity to shew his Cause of Caption; and since this is owing to the Default of the Plaintiff, he shall have no Advantage from it, by detaining the Beasts; and therefore the Defendant on such Non-suit, shall have Return, tho' he hath made no Avowry; but if the Plaintiff in Replevin

Bro. return
des avers pl.
33.
Dyer 280 pl.
14.

vin hath counted, and afterwards is non-suited, since by the Count the Defendant is charged with an unjust Caption and Detention, he must purge himself thereof by an Avowry, before he can be entitled to have Return; for the Return of the Beasts is ordered by the Court on the Justice of the original Caption; and therefore the Defendant must first shew the Justice of this Caption before he can have Return.

Bro. retorn de
avers pl. 23.

But the Return in this Action was never irreplevisable at common Law, whether the Non-suit of the Plaintiff had been before the Avowry or after, or before or after Issue joined; because where the Defendant had Judgment for a Return on a Non-suit, tho' after Verdict, that Judgment was not founded upon the Verdict, but on the Default of the Plaintiff in withdrawing himself at any continuance Day after the Verdict, so that tho' the

the Defendant had Return, yet he had not the Justice or Legality of his Caption established by such Judgment; and therefore as long as the Caption and Detention was not determined by the Judgment of the Court, so long they allowed the Plaintiff after his own Non-suit to take a new Replevin.

But this was found very inconvenient, because by this Means, the Defendant could never get the Restitution of the Beasts; and therefore was not likely to recover his Rent, since he wanted the Pledge or Pain to compel the Tenant to the Payment.

To remedy this Mischief, the Stat of *West. 2. c. 2.* taking Notice, that *postquam adjudicatum fuerit distringenti retorum averiorum, & sic districtus, postquam averia sic retornata iterum irreplegiaverit, & cum viderit distringentem comparentem*

rentem in Curia, paratum sibi respondere, defaultam fecerit, ob quam iterum readjudicabitur distringenti retorum averiorum, & sic bis, vel ter, & in infinitum replegiabuntur Averia, provides that quam cito adjudicatum fuerit retorum averiorum Distringenti, per breve de Judicio mandetur Vicecomiti, quod Retorum habere faciat distringenti de Averiis, in quo Brevi inseratur, quod Vicecomes ea non deliberet sine Brevi, in quo fiat Mentio de Judicio per Justiciarios reddito, &c. which is the Writ of *second Deliverance*. So that by this Act, if the Plaintiff in Replevin be once Non-suit, he cannot now have a new Replevin, but the Writ of second Deliverance which is a judicial Writ, and issued out of the Record of the Replevin, in which the Non-suit was, and is to this Purpose

Reg. Jud. 58.b
2 Inst. 341

*Rex Vicecomiti E. salutem, si A.
fecerit te, &c. & etiam de Catallis
Retor-*

*Retornandis, quæ B. in Curia nostrâ
&c. adjudicata fuerunt ob defaultam
ipsius A. si Retornum inde adjudice-
tur: tunc eidem A. averia & catalla
prædicta sine dilatione liberari fa-
cias, et pone &c. prædictum B.
&c.*

And by the above mentioned Act, ^{2 Inst. 341.}
'tis further provided, *quod si iterato
ille qui replegiaverit Averia, fece-
rit defaultam, vel aliâ occasione
adjudicetur retornum Distinctionis,
jam bis Replegiatæ, remaneat Dis-
tinctionis illa in perpetuum irreplegia-
bilis.* So that now if the Plaintiff
do not prevail in the Writ of *second
Deliverance*, but the Defendant hath
Judgment, whether by the Non-
suit of the Plaintiff, by Abatement
of the Writ, or by Discontinuance
of the Plea, the Retorn is awarded
irreplevisable; that is the Defendant
shall detain the Beasts as a Pledge,
'till the Rent or Duty for which they
were originally taken, be paid to
K k the

the Defendant, and the Plaintiff shall never be admitted to disturb the Defendants Possession by Replevin or Writ of *second Deliverance*.

2 Inst. 341. But if the Plaintiff tender the Rent for which the Distress was originally taken, the Defendant ought to restore the Beasts, and if he refuses, the Plaintiff may recover them by Action of Detinue; because notwithstanding the Judgment for Return irreplevisable, the Beasts still remain as a Pledge, and if the Defendant refuse to make Restitution of the Pledge upon Tender of the Rent, his Detention then is unlawful, and the Plaintiff may punish such Detention in an Action of Detinue; for the Return irreplevisable prevents the bringing back the Pledge, but does not vest the absolute Property thereof in the Defendant, but only a qualified Property 'till the Rent is paid.

The

The Writ of *second Deliverance* ^{2 Inst. 341.} is a *Supersedeas* in Law to the Sheriff, to forbear to execute the Writ *de Retorno Habendo* obtained on the Non-suit of the Plaintiff, if it comes to the Sheriff before Return be made; if after Return be made, 'tis in the Nature of a new Replevin, as appears by the Form thereof before mentioned.

And the *second Deliverance* is ^{2 Inst. 341.} always to bring back the same Distress, which was first taken by the Defendant, and for which he hath already Judgment for a Return; so that if after the Non-suit upon a *Retorno habendo*, the Sheriff returns *Elongata*, by Means whereof the Defendant hath other Beasts of the Plaintiff delivered him in *Witbernham*, in this Case tho' there never was any Return of the original Distress made to the Defendant, (because they were eloiigned by the Plaintiff, so as the Sheriff could not make any Re-

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turn

turn of them,) yet the *second Deliverance* must go for the first Distress, and the Plaintiff must declare of that Distress; for the Writ of second Deliverance is a judicial Writ which issues out of the Record of the first Replevin, and therefore cannot vary from the Record out of which it issues, because it seeks a Deliverance of those Cattle which were formerly adjudged to the Defendant on the Plaintiff's Non-suit, and therefore *ex vi Termini* this second Deliverance must be of the same Beasts, of which the first Deliverance was made to the Plaintiff by Replevin; but it seems after the second Deliverance purchased, the Plaintiff may move the Court for a Restitution of the *Withernam* Beasts.

Where the Defendant puts in a Plea to the Writ of Replevin, as Property in a Stranger or in the Defendant, and these Pleas disaffirming the Property of the Plaintiff, are by

by Verdict found for the Defendant, or upon Demurrer adjudged for him, in these Cases the Defendant shall have Return irreplevifable; for there could be no new Replevin at Common Law, as upon a Non-suit, because the Court had already given thier Judgment upon the Legality of the Caption; for if the Property be in the Defendant or a Stranger, the Plaintiff could have no Cause to complain, and therefore to grant a new Replevin, or which is the same Thing, not to have made the Return irreplevifable, were to leave that same Point open to an Examination, which hath already been determined; and no Writ of second Deliverance can be given by the Statute, for that is only upon the Plaintiff's Non-suit.

But if the Defendant pleads Property in the Plaintiff, and *J. S.* which only abates the Writ under the present Form, or pleads *cepit*
in

in alio Loco, which abates the Count, and consequently the Writ, in these Cases as there can be no Return without an Avowry, for Reasons already given, so that Return cannot in the Nature of the Thing be irreplevisable, because these Pleas only abating the Writ must necessarily allow a Writ under a better Form, and it were a Contradiction to allow a new Replevin to the Plaintiff, for the same Beasts which the Court hath returned to the Defendant irreplevisable. So if the Plaintiff confesseth the Plea of the Defendant to be true, the Defendant shall have Return, but not irreplevisable.

2 Inst, 340. If the Writ of Replevin abate for any Misprision in the Clerk, the Defendant shall have no Return at all, because the Plaintiff is in no Default, but the Officer; so that after such Abatement of the Writ, the Plaintiff's Possession of the Beasts

con-

continues; and therefore it seems that the Defendant in this Case is driven to a new Distress.

But if the Writ abate by Misin-2 Inst. 340. formation or other Default of the Plaintiff, the Defendant shall have Return of the Beasts, but not irreplevifable; because the Defendant by pleading to the Writ, allows the Plaintiff another Writ under another Form.

This Act which awards the Re-2 Inst. 340. turn irreplevifable, extends only to the King's superior Courts of Justice: for the Act directs *quod Attachietur ille qui distrinxit ad veniendum ad certum diem coram Justiciariis, coram quibus Placitum deducatur in præfentiâ Partium*, which Words are to be understood of the King's Justices in his superior Courts; for the Judges of inferior Courts are looked upon as more subject to Mistake and Partiality, and therefore not to be trusted with
the

the Power of awarding a Return irreplevifable, which is for ever to conclude the Plaintiff. But it seems that where Judgment was given upon Verdict and not upon Non-suit, the inferior Courts could award a Return irreplevifable at Common Law.

We come now to shew what Remedy the Defendant hath when he cannot come at the Beasts on the Writ *de Retorno Habendo*.

2 Inst. 338. It is already observed that by the beforementioned Act of W. 2. c. 2. the Sheriff before he executes the Writ of Replevin is obliged to take from the Plaintiff *non solum Plegios de prosequendo, sed etiam de averiis returnandis, si adjudicetur Returnand'. et si quis alio modo plegios ceperit, respondeat ipse de pretio averiorum, & habeat Dominus distringens recuperare per breve quod reddat ei tot averia vel catalla, & si non habeat Ballivus unde reddat, reddat supe-*

superior suus. The Method of proceeding upon this Act is, if the Sheriff by the Writ *de Retorno Habendo* cannot find the original Distress, but returns *Elongata*, the Defendant hath a *Scire facias* to summon the Persons, who became Pledges for the Plaintiff at the Execution of the original Replevin, that the Plaintiff would make Return of the original Distress if Return thereof should be awarded; this *Scire facias* brings the Pledges into Court, and thereby gives them an Opportunity to contest why the Defendant should not have Return of their Beasts, since the Plaintiff's Beasts cannot be found, for whom they were Pledges; if the Pledges cannot shew Cause, then the Defendant hath a Writ to have Return of the Beasts of the Pledges instead of the Plaintiffs.

If the Pledges prove insufficient so as the Sheriff can find none of ² Inf. 340.
 L 1 their

Bro. return.

des avers pl. 2

Dalt. 275.

their Cattle, and thereby is obliged to return *nihil* on the Writ issued against the Beasts of the Pledges, the Sheriff then himself by the said Act becomes liable; and the Defendant hath a *Scire facias* grounded upon the said Act, *quod reddat ei* (the Defendant) *tot averia* or *cattalla*; so that the Defendant is now secured against the Danger he was exposed to at Common Law, which was, that the Plaintiff who had the Possession of the Distress restored to him by the Execution of the *Replevin*, would often sell or dispose of them pending the Suit, and so the Defendant tho' he had Judgment lost the Fruits of it.

There is another Remedy for the Defendant, where the Sheriff returns *Elongata* on the Writ *de Retorno Habendo*, and that is by *Witbernam* against the Plaintiff's Beasts; but this is already mentioned under the Title *Witbernam*.

And

And now by the 17 *Car. 2. c. 7.* ^{W. 3 c. 22. Irish.}
 it is enacted, that wherever any
 Plaintiff in Replevin shall be Non-
 suit before Issue joined in any Court
 of Record, the Defendant making
 a Suggestion in Nature of an Avow-
 ry or Conufance for such Rent, to
 ascertain the Court of the Cause of
 such Distress, the Court upon his
 Prayer, shall award a Writ, &c.
 to enquire touching the Sum in ar-
 rear at the Time of such Distress
 taken, and the Value of the Goods
 or Cattle distrained, &c. and upon
 the Return of the Inquisition, the
 Defendant shall have Judgment to
 recover against the Plaintiff, the
 Arrearages of such Rent, in Case
 the Goods or Cattle distrained a-
 mount unto the Value; and in Case
 they shall not amount to that Value,
 then so much as the Value of the
 said Goods and Cattle so distrained
 shall amount to, with his full Costs
 of Suit; and shall have Execution

L 1 2

there

thereupon by *Fieri facias* or *Elegit* or otherwise. So if Judgment be given upon Demurrer, for the Avowant for any Rent. And in Case the Plaintiff shall be Non-suit after Confessance or Avowry made, and Issue joined, or if the Verdict shall be given against the Plaintiff, the Jurors that are impanelled to enquire of such Issue, shall at the Prayer of the Defendant enquire concerning the Sum in Arrear, and the Value of the Goods or Cattle distrained, and thereon the Avowant shall have Judgment, &c.

Carth. 253.
Baker v. Lade

Where upon a Demurrer, the Defendant had Judgment for a Return irreplevisable at Common Law, and a Writ of Enquiry awarded pursuant to this Statute, on Error brought, it was objected, that when the Defendant proceeds on the Statute, he ought not to have Judgment for a Return; but the Court held that the Judgment was well given, for the Statute doth not alter the Judgment.

Judgment at Common Law, but only gives a farther Remedy.

Quere whether a Writ of * second Deliverance lies since this Statute, when the Avowry is for Rent, *vide* 1 Vent. 64.

VIII. Of the Writ of Recaption.

It is already observed that where F.N.B. 71. E. the Defendant hath Judgment upon his Avowry in Replevin, he shall have Restitution of the Beasts, to detain them as a Pledge, until the Rent or Duty for which they were taken, be paid or satisfied; and since he hath got Security to have Return upon making out the Justice of his first Caption, it is highly reasonable that, pending that Suit, the Tenants should be protected from farther Distresses for the same Rent or

* Mich. 6 Geo. 2 *Keef v. Weldon* in B. R. in *Hib.* a second Deliverance was denied in the Case of a Non-suit for Rent.

or Cause for which the first Distress was taken; and for this Purpose the Writ of Recaption was framed, in which if the Defendant be convicted he shall be fined to the King, because by the second Caption the Defendant takes upon him to determine the Justice and Legality of the first, while that very Point is under the Consideration of the Court of Justice in which the Replevin depends; for if the first Distress were lawful, he shall have Return of it, and therefore the second is unreasonable; and if the first were unlawful, much more so is the second Taking for the same Cause; so that the Recaption lies where the Cause of the first Caption was just.

F.N.B. 71.E. But it seems that if *A.* distrains Beasts Damage Feasant, and pending that Suit, the same Cattle or other Cattle of the same Proprietors trespass the Soil of *A.* *A.* may distrain again pending the first Suit, be-

because each Distress is for a Distinct and several Trespass or Injury, for which *A.* is intitled to Satisfaction; for the Restitution of the Cattle for the first Trespass will be no Compensation for the second Trespass, since *A.* cannot legally with hold them as a Pledge for Satisfaction of a second Trespass, when the first is satisfied.

The Design then of the Writ of F.N.B. 72.B. Recaption being to prevent a second Distress for the same Rent or Duty, it follows that the Defendant cannot avow as in Replevin, because the Avowry is in Order to have a Return of the Pledges, but in Recaption whether the first Distress were just or unlawful, the Defendant cannot have Return of the Beasts under the Notion of the Pledge; for that were to invert the Design of the Law, by allowing the Defendant a second Distress by Judgment upon that very Writ which was framed to punish
the

the Person taking a second Distress for the same Thing.

F.N.B.72.B.

In the Writ therefore of Recaption, the Defendant must * justify as in Trespass, because since he cannot avow the Taking under the Notion of a Pledge for a Rent or Duty, (in as much as he hath already a Pledge for that, which will be returned to him, if in the Event of the Suit in the Replevin the Rent appears to be in arrear,) he must therefore be looked upon as a Trespasser, unless he can justify the taking for another Cause.

And hence it is that there are no Pledges *de Retorno Habendo* taken from the Plaintiff as in the Replevin, because tho' the Deliverance of the Beasts to the Plaintiff be immediate, as in the Replevin, yet the
De-

* Note the Defence, *Viz: defendit vim et Injuriam quando, &c. Et quicquid est in contemptum Domini Regis, Et ejus mandati.* 29 Ed. 3. 28.

Defendant can have no Return, because if the Rent or Duty was unpaid for which the Distress was taken, the Defendant will have Restitution of his first Distress, which being to remain in his Hands 'till the Rent be paid, there is no Reason for the Restitution of the second Distress, and consequently no Occasion for the Pledges *de Retorno Habendo*, as in the original Replevin.

And here it is not necessary to F.N.B.72.B. entitle a Man to the Writ of Recaption, that the same Beasts or Cattle be taken the second Time, which were first taken, but only that the Cattle or Beasts of the same Person be distrained for the same Rent or Duty; for the Injury is the same to the Plaintiff in Replevin, whether the first Distress be again taken or any other Goods or Cattle of the Plaintiff, and the

M m Writ

Writ of Recaption is to punish the Injury.

F.N.B.72 G. But if the Lord distrains the Beasts of his Tenant for Rent, and afterwards distrains the Beasts of *J. S.* a Stranger being on the Land, for the same Rent, in this Case no Writ of Recaption lies for this second Distress, not for the Tenant, because the second Distress is not of the Tenants Beasts, nor for *J. S.* because the Beasts of *J. S.* were not formerly taken, and therefore *J. S.* must take out an original Replevin or his Action of Trespass, as he thinks fit.

F.N.B.71.H. Yet if the Lord distrains his Tenant, and pending that Plea, the Lord commands his Servant to distrain the Tenant again for the same Rent, the Tenant shall have a Recaption against the Lord himself for the second Distress, because the second Distress is esteemed in Law
to

to be taken by the Lord himself, according to the Rule *qui facit per alium, facit per se ipsum*; so if the Servant had taken the second Distress without the Lord's Command, yet if the Lord had afterwards by any Act subsequent agreed to the taking of the second Distress, as by joyning in *Aid* with the Servant, to defend the Justice of the Caption, such subsequent Agreement makes it a Distress of the Lords, and to have been taken in his Right *ab initio*; for *omnis ratihabitio mandato equiparatur*; and a parol Agreement of the Lord's to the second Distress seems sufficient. But if there be no such Command, or subsequent Agreement of the Lords, the Tenant shall have no Recaption either against the Lord or the Servant, tho' the Servant makes Conu-
sance of the second Distress in Right of his Lord, and for the same Rent for which the Lord took the first Distress; for the Writ of Recap-

M m 3

tion

tion is to punish the second Caption, only where 'tis wilfully made by the same Person that made the first, or by another under his Direction or Authority; and it may be that the Lord and his Servant had not Notice of each others Caption.

F.N.B. 71. G. So that it seems that where there is no precedent Command nor a subsequent Agreement of the Lord's to the Servants second Caption, the Tenant is left to his Action of Trespass against the Servant; because the second Caption is a Violation of Property, and unlawful, tho' the Rent be in Arrear, since the Lord by the first Distress hath taken a Pledge for his Rent, which will be returned to him if in the Event of the Suit in Replevin the Tenant be found to be in Arrear.

F.N.B. 71. I. If the Lord distrains the Beasts
72 E. of A. and B. for Rent, and for the same Rent distrains a second Time
the

the Beasts of *A.* only, *A.* shall have a Writ of Recaption against the Lord, because there is a Distress of *A.* already for that Rent, which the Lord will have a Return of, if the Rent be found in Arrear.

But if the first Distress had been only of *A.* the Tenant, and the second Distress had been the Cattle of *A.* and of *B.* a Stranger, which they have in Common, *Fitz-Herbert* makes a Doubt whether *A.* in this Case shall have a Recaption, because of *B.*'s Interest in the Cattle, for 'tis plain *B.* cannot joyn in the Recaption, because his Beasts were never distrained before. F.N.B.72.E.

If the Lord distrains his Tenant, and he replevies them, and the Lord avows for Rent, and the Tenant pleads *rien Arrear*, or levied by Distress, and pending this Suit another Gale of Rent becomes due, the Lord may distrain again the Beasts F.N.B.71.M.

Beasts of the Tenant for the last Rent incurred, and no Writ of Recaption lies for the Tenant, because these Distresses are for two distinct Causes, that is for two several half Years Rent.

But if the Tenant pleaded to the Avowry in the first Replevin *Hors de son Fee*, and pending that Suit the Lord had distrained again for another half Years Rent, the Tenant should have a Writ of Recaption, because by the Plea of *Hors de son Fee* the Lord's Title to the Rent is self and not to this or that particular Gale is in Dispute, and that Title may be determined by the first Caption, and therefore the second Distress being unnecessary to try the Title to the Rent, the Writ of Recaption lies to prevent it, and punish the Lord for taking the second Distress, and to protect the Tenant from such Oppression,

-And

And this Writ of Recaption lies F.N.B.72.A. for the Tenant before Avowry made by the Lord in the first Replevin, for otherwise the Remedy would not be adequate; because the Lord might otherwise harrafs the Tenant by several Distresses, before the Lord by the Rules of Court could be compelled to avow; but then the Tenant must in his Declaration on the Recaption aver that the second Distress was taken for the same Cause as the first; for otherwise the Tenant fails in making out to the Court his Title to the Writ of Recaption, and consequently cannot punish the Lord for taking the second Distress.

F I N I S.

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- R***ecordari*, *Pōne* and *Certiorari* not abate-
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